

CIVIL JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN SCOTLAND

ALASTAIR MENNIE

PhD

University of Edinburgh

1991



CIVIL JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN SCOTLAND

An analysis of provisions of the 1968 Brussels and 1988 Lugano Jurisdiction and Judgments Conventions and the Civil Jurisdiction and Judgments Act 1982, with particular reference to the effects of the provisions in Scotland

UNIVERSITY OF EDINBURGH

ABSTRACT OF THESIS (Regulation 7.9)

The subtitle of this thesis is "An analysis of provisions of the 1968 Brussels and 1988 Lugano Jurisdiction and Judgments Conventions and the Civil Jurisdiction and Judgments Act 1982, with particular reference to the effects of the provisions in Scotland". The thesis is divided into two parts.

Part I is concerned with the Conventions and third states, intra-EC/EFTA bloc and intra-UK actions and the courts' discretionary powers. After a general introduction to the subject, it examines the effects of the Conventions in civil proceedings which are linked in one way or another to a state outside the EC/EFTA bloc. It considers here firstly the effects of the rules of jurisdiction of the Conventions, secondly the circumstances in which a court may decline to exercise the jurisdiction which it has in terms of the Conventions and thirdly the implications of the Conventions' provisions concerning the recognition and enforcement of judgments. Consideration is then given to certain problems relating to (a) actions involving more than one state in the EC/EFTA bloc and (b) actions purely internal to one state in the bloc; attention focuses on the effects of the Conventions on the doctrine of forum non conveniens in the United Kingdom. At the end of Part I the rules concerning the remitting and transferring of actions between one Scottish court and another are considered in the light of the Conventions and Act.

Part II concerns the duties of a court in the EC/EFTA bloc to verify both its jurisdiction and the giving of adequate notice of the proceedings to the defender. The duties imposed principally by art 20 of the Conventions are considered from the point of view of the rules of court which should exist in Scotland - in both the Court of Session and the sheriff courts - to facilitate the fulfilling of their duties by the courts. Consideration is given to the need for a court to be informed of the factors relating to jurisdiction (a) when an action is brought and/or (b) if decree in absence is subsequently sought. The extent of the court's duty to examine its jurisdiction ex proprio motu is examined. Attention is focused in turn on what may be different elements inherent in jurisdiction in terms of the Conventions: the lack of a prorogation agreement in favour of another court, the lack of identical proceedings in another court, the domicile of the defender, the factor which links the defender with the court in which the action has been brought. The writer sets out model rules of court for the Court of Session and the sheriff courts concerning (a) averments of jurisdiction in summonses and initial writs and (b) matters to be considered if decree in absence is sought.

Table of Contents

	page
Preface	iv
Note on terminology	vi
PART I The Conventions and third states, intra-EC/EFTA bloc and intra-UK actions and the courts' discretionary powers	1
PART II The duty of the court to verify both its jurisdiction and the giving of adequate notice to the defender	147
Appendix Table of author's publications on aspects of Conventions and Act	323

[There is a more detailed table of contents at the beginning of each Part.]

Preface

I began the preparation of this thesis by examining the structure of the Brussels Convention and the Civil Jurisdiction and Judgments Act 1982. As well as considering the relationship to each other of the various schemes of jurisdiction and of recognition and enforcement which are to be found in the Convention and Act, I examined the relationship to each other of the jurisdiction provisions of the Convention. My attention then turned to particular provisions of the Convention and Act, provisions such as art 5(3) of the Convention and ss 41 - 46 of the Act; I felt that there was scope for further work on these provisions. In due course I became aware of what I now regard as the central problems of the Convention: the extent to which it takes account of the world outside the EC, the impact which it has on matters internal to one state, the duty which it imposes on courts to verify their jurisdiction.

Remarkably little work, I found, had been carried out on these problems. I therefore decided that in this thesis, making use of the knowledge and understanding which I had acquired of the structure of the Convention and Act and also of the implications of their principal provisions, I should try to analyse in a Scottish context the significance of the Convention in matters concerning non-contracting states and in matters internal to one contracting state; I should also examine the courts' duty to examine their jurisdiction, having particular regard to the rules of court which should exist in this area in Scotland. I have divided and subdivided the discussion in what I consider to be the most appropriate way, but on account of the interrelationship of the various problems and themes much cross-

referencing and some repetition are inevitable.

In preparing this thesis I have made use of the sources available to me on 1 May 1991.

This thesis has been prepared on the basis that the latest version of the Brussels Convention and the Lugano Convention are both in force in the United Kingdom.

In the course of the research for this thesis I was given permission by my supervisor to publish articles and other items on civil jurisdiction and the enforcement of judgments. The publications listed in the Appendix are the result.

I can declare that this thesis has been composed by myself alone and that the work which enabled it to be produced was carried out by myself alone.

Alastair Mennie

30 June 1991

Note on terminology

Throughout this thesis,

"the Brussels Convention" means the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Brussels on 27 September 1968

"the Lugano Convention" means the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Lugano on 16 September 1988

"the 1978 Accession Convention" means the Convention on the accession of Denmark, Ireland and the United Kingdom to the Brussels Convention, signed at Luxembourg on 9 October 1978

"the 1982 Accession Convention" means the Convention on the accession of Greece to the Brussels Convention, signed at Luxembourg on 25 October 1982

"the 1989 Accession Convention" means the Convention on the accession of Spain and Portugal to the Brussels Convention, signed at Donostia - San Sebastian on 26 May 1989

"the Act" means the Civil Jurisdiction and Judgments Act 1982

Unless the context otherwise requires,

"the Convention" means the Brussels Convention

"the Conventions" means the Brussels and Lugano Conventions

The relationship of the Brussels Convention and the Lugano Convention to each other is somewhat complex. Article 54B of the Lugano Convention is concerned with the determination of the applicable Convention in any particular situation. In any case only one of the Conventions will be applicable, but as the terms of the two Conventions are virtually identical, ascertaining the applicable Convention is rarely of practical importance. If, for example, in an illustration in the text jurisdiction is being based on the delict in question having taken place in the territory of the court and the defender being domiciled in another state in the EC / EFTA bloc, it will be stated that jurisdiction is founded on art 5(3) of the Conventions. But it is appreciated that jurisdiction is in fact founded on only one of the Conventions; in this case the applicable Convention depends on the domicile of the defender.

P A R T I

THE CONVENTIONS AND THIRD STATES, INTRA-EC/EFTA BLOC AND INTRA-UK ACTIONS AND THE COURTS' DISCRETIONARY POWERS

	page
1 Introduction	2
2 The Conventions and third states: jurisdiction	13
3 The Conventions and third states: the declining of jurisdiction	48
4 The Conventions and third states: the recognition and enforcement of judgments	85
5 Intra-EC/EFTA bloc and intra-UK actions: particular problems	105
6 The remitting and transferring of actions	128
Notes	137

I Introduction

This Part of the thesis is concerned with certain related matters which are generally not expressly determined by provisions of the Conventions but which are nevertheless of not inconsiderable importance in the application of the Conventions. The subject of Chapters 2 - 4 is the Conventions and non-contracting states. The Conventions are of course generally seen as concerning legal relationships within the EC / EFTA bloc. But the bloc is not surrounded by a vacuum, and many legal relationships concern, in one way or another, at least one non-contracting state as well as at least one state in the EC / EFTA bloc. The chapters attempt to consider the implications of the provisions of the Conventions for such relationships. The case law in this area is negligible, and very little academic work has been carried out.¹ But the present writer suspects that in the next few years the European Court and national courts of member states will be asked to determine questions in this area. There may very well then be a steady stream of articles on the case law and on the problems in general. The effective incorporation of Spain, Portugal and the EFTA states into the schemes of jurisdiction and the enforcement of judgments, the increase in importance of the Community in world trade, and the greater awareness of the Conventions themselves will all play a part in the development of case law on the Conventions and non-contracting states.

The effect of the Conventions on the common law doctrine of forum non conveniens will be considered in Chapters 3 and 5. In Chapter 3 the focus will be on the possibility of declining jurisdiction on the basis of forum non conveniens in favour of a court of a non-

contracting state; in Chapter 5 the question will be whether a forum non conveniens plea may be made in favour of another court in the EC / EFTA bloc. Chapter 5 will also examine the relevance of the Conventions in actions purely internal to the United Kingdom. In Chapter 6 it will be asked whether the statutory provisions relating to the remitting and transferring of actions within Scotland are affected by the entry into force of the Conventions.

As three of the following chapters concern the Conventions and non-contracting states, and one chapter is in part concerned with the related subject of the Conventions and internal actions, it would seem useful to set out here a short introduction to these subjects as a whole. It is often said that the Conventions are applicable to questions of jurisdiction and of recognition and enforcement which concern more than one state in the EC / EFTA bloc. They are not applicable, it is said, to questions which are internal to one EC or EFTA state or which concern an EC state or an EFTA state together with a non - EC / EFTA state. In an attempt to justify these statements with regard to the rules of jurisdiction of the Conventions, reference is generally made to para four of the preamble to the Brussels Convention / para three of the preamble to the Lugano Convention and to arts 2 - 4. With regard to recognition and enforcement, reference is made to the basic rules concerning the recognising and enforcing of judgments, which are to be found, respectively, in arts 26 and 31.

Paragraph four of the preamble to the Brussels Convention states that the contracting states decided to conclude the Convention partly on account of the need "to determine the international jurisdiction of

their courts". Together with certain passages in the Jenard and Schlosser Reports, this statement is often seen as indicating that the application of the jurisdiction provisions of the Convention is restricted to actions with an international element. The general rules to be found in arts 2 - 4 are, of course, respectively, that if a defender is domiciled in a contracting state, he may be sued in the courts of that state, that a defender domiciled in a contracting state may only be sued in the courts of another contracting state if this is permitted by one of the rules of the Convention, and that whether a defender not domiciled in any contracting state may be sued in the courts of any one contracting state is a matter for the law of that state. So, it is said, the Convention is concerned with intra-EC jurisdiction. The Lugano Convention is of course similarly structured.

Article 26 of the Brussels Convention provides that "[a] judgment given in a Contracting State shall be recognised in the other Contracting States without any special procedure being required"; art 31 provides that "[a] judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, the order for its enforcement has been issued there". So it is intra-EC recognition and enforcement with which the Convention is concerned; it is not concerned with internal recognition and enforcement or with international recognition and enforcement in general. Again, the approach of the Lugano Convention is similar.

The question of whether there is indeed a category of actions internal to one EC or EFTA state which are outside the scope of the

rules of jurisdiction of the Conventions, and, if so, precisely what the limits of this category are, is a difficult one; some consideration will be given to it in Chapter 5. The statement made above, that many proceedings in courts of EC and EFTA states have links with one or more non - EC / EFTA states, and some of these also have links with one or more of the other EC and EFTA states, is in fact a trite one; Chapters 2 - 4 are concerned with the effects of the Conventions on these actions and judgments which have links with non - EC / EFTA states. They will attempt to answer the question: To what extent is the general view about this matter, referred to near the beginning of this chapter, correct? States which are not parties to the Conventions will be referred to as third states. It should be kept in mind that the effects of the Conventions on proceedings involving the state of the forum and a third state alone may in certain circumstances be different from those on proceedings involving another EC or EFTA state as well as the state of the forum and a third state.

Chapters 2 - 4 will attempt to distinguish the various rules of the Conventions explicitly or implicitly concerning third states. The perspective of this thesis is of course Scottish, and certain relevant domestic rules of both Scots law and English law will be summarised. The effect of the rules of the Conventions on these rules of Scots law and English law will be considered. As aspects of the doctrine of forum non conveniens are to be considered in Chapters 3 and 5, it seems useful to say something about forum non conveniens at the end of this chapter.

There is clearly much merit in first considering the matter of

jurisdiction, and then turning to recognition and enforcement. But in fact separating the material into three principal sections seems appropriate. Chapter 2 will therefore concern the existence of jurisdiction, Chapter 3 the declining to exercise jurisdiction and Chapter 4 recognition and enforcement. This division can, it is submitted, be justified by reference to both the Conventions and the domestic law in Scotland and England; each set of rules makes it clear that in certain circumstances in which jurisdiction undoubtedly exists, the court in which proceedings are brought should or may decline to exercise that jurisdiction. On account of the recent English case law and the comments of various academic writers, the lengthiest discussion will in fact be in the chapter on the declining to exercise jurisdiction.

It may be useful briefly to outline the circumstances in which proceedings may be linked to a third state. Three sets of circumstances can, it is suggested, be identified here. Firstly, one of the parties - the pursuer or the defender - may have ties with a third state; he may be resident or domiciled there, or have its nationality. Secondly, the locus, or one of the loci, of the subject matter of the proceedings may be in a third state; for example the delict may allegedly have taken place in a third state, or the disputed property may be situated there. And thirdly, a court of a third state may, loosely speaking, be involved in the matter; its jurisdiction might have been prorogated by the parties, there might be proceedings taking place in it, or it might even have given a judgment in proceedings with the same subject matter and between the same parties. Of course certain of these connecting factors are of much greater significance than others. And many actions will be

linked to a third state by more than one factor; it may be, for example, that the defender is domiciled in a third state, the contractual obligation in question was to be performed in that state, and there is a prorogation agreement in favour of the courts of that state.

Articles 2 - 4 of the Conventions have already been referred to and, as is well known, domicile - in particular the domicile of the defender in a contracting state - is the principal connecting factor used by the rules of jurisdiction of the Conventions. But the choice of law rules in arts 52 and 53, which are to be applied in determining the domicile of natural and legal persons and other bodies, are of relevance in the contexts of the issues considered in all three chapters concerning the Conventions and third states. It therefore seems appropriate to comment on arts 52 and 53 at this point. Article 52 is of course concerned with natural persons - individuals - and art 53 with legal persons and other bodies which can be parties to actions.

Article 52 para three of the Brussels Convention, containing the infamous rule relating to domiciles of dependence of natural persons, is being deleted by the 1989 Accession Convention. Paragraph one of art 52 concerns domicile in the state of the forum, and para two domicile in another EC or EFTA state; no equivalent provision concerns domicile in a third state. It is in fact only in art 59² that reference is made to parties domiciled in a third state. The effect of paras one and two is that to determine whether a natural person is domiciled in a particular EC or EFTA state, the law of that state is applicable. Unless that law takes account of the person's links with

other states, such links are of no significance. An individual who is domiciled in an EC or EFTA state in terms of the law of that state may of course also be domiciled in a third state in terms of the law of that third state and / or of one or more of the EC and EFTA states. But for the purposes of the rules of jurisdiction of the Conventions, such a domicile is irrelevant. On account of the approach of both art 52 and Title II of the Conventions, if, in terms of the law of a particular EC or EFTA state, an individual is domiciled in that state on account of his frequent use of a holiday house in the state, then even if his ties are almost all with a particular third state, his domicile in that third state will not affect the application of the rules of jurisdiction of the Conventions.

The rule relating to the domicile of legal persons and other bodies is different from that concerning natural persons. Article 53 para one provides that the lex fori is to be applied to determine whether or not a legal person is domiciled in a particular state. So the law of the state in question is only applicable if the issue is referred to it by the lex fori. There are of course different approaches to the localising of a legal person. According to some legal systems, a legal person has its seat and domicile at the place where its administration is carried out; according to other systems, the seat and domicile are at the place designated as the seat in the documents instituting the legal person.³ Many legal persons would be held in terms of one of these approaches, but not the other, to be domiciled in one of the EC or EFTA states. If the lex fori considers a legal person to be domiciled in an EC or EFTA state, as far as the rules of

jurisdiction of the Conventions are concerned its being considered by one or more other systems to be domiciled rather in a third state is of no consequence.

There would seem to be much merit in referring to persons not domiciled in any EC or EFTA state as domiciliaries of third states. For one thing, although there may be peripatetic individuals who would not be held to be domiciled in any EC or EFTA state or in any third state, such cases will be extremely rare. And for an individual not domiciled in any EC or EFTA state, his being domiciled in a particular third state is clearly generally much more significant than his not being domiciled in any EC or EFTA state. Where a reference is made in this Part to a person domiciled in a third state, this should be interpreted as a reference to a person not domiciled in any EC or EFTA state.

The doctrine of forum non conveniens was first developed in Scotland in the nineteenth century.⁴ In the twentieth century it has been adopted in England, Ireland, the United States and certain Commonwealth states but is still virtually unknown to the civil law systems within the EC/EFTA bloc. It has been said that at common law in Scotland a court may decline to exercise its jurisdiction if a defender states a preliminary plea of forum non conveniens and "satisfies the Court that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably⁵ for the interests of all the parties and for the ends of justice". But if the courts concerned are both in Scotland, the defender should seek to have the action remitted or transferred rather than sisted or dismissed on the basis of forum non conveniens: "[n]ormally the plea

is taken when the question arises between a Court in this country and a Court in some other country".⁶

At common law the disposal of the plea is always "a matter for the discretion of the Court in the light of the whole circumstances".⁷ As Maclaren puts it, "the determination of the question of sustaining or repelling the plea of forum non conveniens varies with the circumstances of each particular case".⁸ If an action with the same subject matter and the same parties has already been raised in a court outside Scotland, at common law the plea is likely to be successful; but if the action in the non-Scottish court is only being contemplated, the result of a plea of forum non conveniens is less certain.⁹ It was stated above that a plea of forum non conveniens is not appropriate in the internal Scottish context; if proceedings with the same subject matter and the same parties are already taking place within Scotland, the defender should rather plead lis alibi pendens.¹⁰ The better view seems to be that the plea of forum non conveniens, rather than lis alibi pendens, should be used in connection with such proceedings in a non-Scottish court.¹¹

It has been suggested that, "[w]here the plea is sustained, the action should in the ordinary case be dismissed".¹² But on various occasions in which the defender has stated his willingness to have the action heard in a foreign court, the Court of Session has been prepared initially to sist the Scottish action to give him an opportunity to contest the merits of the case in the foreign court.¹³

There is of course much case law on the circumstances in which, when it is open to the Scottish court to uphold a plea of forum non conveniens, it should in fact do so. But that case law does not

concern the question of when it is still open to the court to uphold the plea; as a result it is outside the scope of this thesis.¹⁴

The relevant rule in Dicey and Morris is this:

English courts have jurisdiction, whenever it is necessary to prevent injustice, to stay or strike out an action or other proceedings in England....As a general rule in order to justify a stay of English proceedings (a) there must be another forum to whose jurisdiction the defendant is amenable in which justice can be done between the parties at substantially less inconvenience or expense and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.¹⁵

There is discussed in Dicey and Morris¹⁶ the case law which led to the introduction of the present doctrine of forum non conveniens in English law. In The Atlantic Star¹⁷ and then in MacShannon v Rockware Glass¹⁸ the House of Lords adopted an increasingly flexible approach to the staying of actions, but nevertheless refused to adopt the Scottish doctrine of forum non conveniens. But as Dicey and Morris state, in MacShannon

it was recognised that the reformation in [The Atlantic Star and MacShannon] of the principles on which the English court acted was not far removed in practice from the doctrine of forum non conveniens.¹⁹

And then in 1984, in The Abidin Daver,²⁰ Lord Diplock stated that

judicial chauvinism has been replaced by judicial comity to an extent which I think the time is now right to acknowledge frankly is, in the field of law with which this appeal is concerned, indistinguishable from the Scottish legal doctrine of forum non conveniens.²¹

Three years later, of course, the Brussels Convention became part of the law in the United Kingdom. In Chapter 3 consideration will be given to the question of whether as a result, shortly after the

introduction of the doctrine into English law in The Abidin Daver, the courts' powers to stay or strike out an action on the grounds of forum non conveniens were significantly reduced.

2 The Conventions and third states: jurisdiction

Title II of the Conventions is entitled "Jurisdiction"; it contains arts 2 - 24. Of these provisions, arts 19 and 20 are concerned with the courts' duty to verify their jurisdiction and to ensure that the defender has been given adequate notice of the proceedings. Articles 21 - 23, entitled "Lis pendens - related actions" are concerned with the declining of jurisdiction rather than with jurisdiction itself; they will be considered in Chapter 3. Article 24 makes special provision with regard to what are described as "provisional, including protective, measures". Of the remaining articles of Title II, which contain the actual rules of jurisdiction of the Conventions, the most important are generally considered to be arts 2 - 4. But other articles contain rules which have priority over the rules in arts 2 - 4 and, on account of what he regards as the order of priority of the rules in Title II, the present writer generally suggests that, in ascertaining the courts with jurisdiction in any particular action, practitioners consider the articles in the following order: 16, 18, 7 - 12A, 13 - 15, 17, 2 - 4, 5 - 6A. This chapter is of course concerned with the implications of the articles in actions involving third states, and it is in this order that the articles will be considered.

Article 16, which is headed "Exclusive jurisdiction" and which appears to take priority over the other articles containing rules of jurisdiction, concerns five different types of subject matter: certain rights in immovable property, certain corporate law matters, the validity of entries in public registers, the registration and validity of intellectual property rights, and the enforcement of

judgments. The general approach of art 16 can be illustrated by reference to art 16(3). It provides:

The following courts shall have exclusive jurisdiction, regardless of domicile:

in proceedings which have as their object the validity of entries in public registers, the courts of the Contracting State in which the register is kept.

So if an action concerns the validity of an entry in a public register in the United Kingdom, the United Kingdom courts will have jurisdiction; the courts of no other state in the EC / EFTA bloc will have jurisdiction. The domestic law in the United Kingdom will determine the particular courts with jurisdiction. Within the EC / EFTA bloc, in other words, international jurisdiction is determined purely by the locus of the subject matter of the action. On account of the perceived desirability of the action taking place in a particular contracting state - the state whose courts are in the best position to entertain the proceedings and give an enforceable judgment - any links which the pursuer or the defender may have with any EC or EFTA state or any third state are immaterial; so too is the involvement in the dispute of any court of a third state. Article 16, in other words, sets out exceptions to the general rule that whether the defender is domiciled in an EC or EFTA state or in a third state is of considerable significance in the determining of jurisdiction within the EC / EFTA bloc. But like the other jurisdiction provisions which will be considered, it makes no reference to the possibility of proceedings taking place in a court of a third state too; the jurisdiction which it confers exists irrespective of whether or not there are such proceedings.

Article 16, it should be said, appears only to be applicable if the subject matter in question is situated in an EC or EFTA state. Is it of any relevance at all if it is wished to bring an action concerning the validity of an entry in a public register situated in a third state? The answer to this question is far from clear, but it seems more appropriate to consider it in Chapter 3.

In the original version of the Brussels Convention, art 16(1) was in line with the general approach of art 16. It provided:

The following courts shall have exclusive jurisdiction, regardless of domicile:

in proceedings which have as their object rights in rem in, or tenancies of, immovable property, the courts of the Contracting State in which the property is situated.

But in the 1989 Accession Convention provision was made for there in effect to be added to these words:

however, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Contracting State in which the defendant is domiciled shall also have jurisdiction, provided that the landlord and the tenant are natural persons and are domiciled in the same Contracting State.

So the domiciles of the parties, as well as the locus of the property, may now be of relevance in the context of art 16(1) of the Brussels Convention. The reference here is of course simply to domicile in an EC state; the provision can be used to illustrate the point that domiciles in third states do not affect international jurisdiction within the EC. It is immaterial whether the defender is domiciled only in a particular EC state or in both an EC state and (in terms of the law of any state) a third state. It was considered that persons who both have a domicile in a particular EC state should

be able to litigate there in connection with certain matters within the scope of art 16(1). The domicile link which each one has with the particular EC state justifies the state's courts having jurisdiction; this justification is not taken away by the parties also having domicile links with other states - other EC states or third states.

The proviso in the Lugano Convention, it should be said, is slightly different from that in the latest version of the Brussels Convention. It reads:

however, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Contracting State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and neither party is domiciled in the Contracting State in which the property is situated.

Once again the focus is on domiciles within the contracting states; any domiciles in third states are of no significance.

Article 18 of both principal Conventions provides that

....a court of a Contracting State before whom a defendant enters an appearance shall have jurisdiction. This rule shall not apply....where another court has exclusive jurisdiction by virtue of Article 16.

The scope of the rule in art 18 appears to be very wide, but several writers have in fact doubted whether it operates to confer jurisdiction irrespective of the domiciles of the parties.²² As a general rule the Convention does not determine jurisdiction in actions against persons domiciled in third states. Does art 18, like art 16, contain an exception to this general rule? In art 4 the general rule is stated to be "subject to the provisions of Article 16". There is no reference to art 17 or art 18, but as will be seen

below art 17 clearly contains an exception to the general rule in art 4; this point can be used by those who argue that art 18 contains an exception.

O'Malley and Layton state²³ that "some controversy surrounds the question whether domicile is relevant for the purposes of this Article". They mention four possible interpretations of art 18 of the Brussels Convention: (1) that it applies irrespective of the domiciles of the parties, (2) that it only applies if the defender is domiciled in an EC state, (3) that it only applies if at least one of the parties is domiciled in an EC state and (4) that it only applies if the other provisions of Title II confer jurisdiction on at least one court in the EC. The first of these interpretations is advanced by Gothot and Holleaux:²⁴

....l'article 18 ne subordonne sa propre application à aucune condition de domicile de l'une des parties dans la Communauté. Même si les parties sont toutes domiciliées hors de la Communauté, leur volonté implicite d'attribuer compétence au juge saisi suffit à rattacher le procès à la Convention pour le jeu de l'article 18.

In the context of art 18, the Jenard Report speaks²⁵ of "a defendant domiciled in a Contracting State [being] sued in a court of another Contracting State which does not have jurisdiction under the Convention". There is an implication that the provision of the Conventions is only applicable if the defender is domiciled in an EC or EFTA state. With regard to the third possible interpretation set out above, reference is made to art 17. As will be seen, art 17 also comes under the heading "Prorogation of jurisdiction" in Title II; it sets out a rule applicable where "one or more [of the parties] is domiciled in a Contracting State"; it can be suggested that these

words should be considered as implicit in art 18 too.²⁶ The fourth interpretation set out above is advanced by German writers.²⁷ It appears to treat art 18 as a subsidiary rule, applicable only if at least one of the other rules in Title II provides one or more courts in the EC / EFTA bloc with jurisdiction against the defender.

The present writer does not find the fourth interpretation satisfactory. It involves reading a great deal into art 18 itself, and there do not appear to be good arguments in its favour based on the policy of the Conventions. In the English language text of the Conventions, the opening words of art 18 are of course: "Apart from jurisdiction derived from other provisions of this Convention..." "Jurisdiction" could be interpreted here as "jurisdiction of other courts", and seen as supporting interpretation 4. But the French language text states: "Outre les cas où sa compétence résulte d'autres dispositions de la présente convention...." and the German one provides: "Sofern das Gericht eines Vertragsstaats nicht bereits nach anderen Vorschriften dieses Übereinkommens zuständig ist...." These texts make it clear that "jurisdiction" in the English language text of art 18 means rather "where its own jurisdiction is".

The first interpretation given above is certainly an attractive one. After all, art 18 makes no reference to domicile. But of course articles of the Conventions are not to be interpreted as if they were sections of an Act of Parliament. In support of the first interpretation it could be said that the opening words of the French and German language texts imply that art 18 is a "mopping up" provision, giving jurisdiction in any non-exclusive jurisdiction action in which the defender has appeared (without contesting

jurisdiction) but the court does not have jurisdiction on account of any other provision of Title II. But while seeing merit in each of interpretations (1), (2) and (3), the present writer finds (3) most attractive.

Outside the category of exclusive jurisdiction proceedings, which are in any event excluded from the scope of art 18, the Conventions are concerned almost entirely with determining jurisdiction in actions against persons domiciled in the EC / EFTA bloc. So art 18 is clearly applicable in the case of such defenders. But there is also an element of protection given to pursuers domiciled in the contracting states. Article 4 para two, for example, gives some assistance to such pursuers. But much more importantly art 17, the other article in Section 6 of the Conventions, effectively gives validity to a prorogation agreement even if it is only the pursuer in the ensuing action who is domiciled in the contracting states. Of course a distinction can be drawn between art 17 and art 18. In the art 17 context it can be said that special protection should be given to a pursuer who has relied on a prorogation agreement previously entered into by the defender. But, it is submitted, there is a strong case for arguing that a pursuer domiciled in the EC / EFTA bloc should be able to bring proceedings in a court of an EC or EFTA state against a domiciliary of a third state knowing that if he enters appearance (without contesting jurisdiction) the court will then have jurisdiction against the defender. The Conventions, in other words, should protect pursuers domiciled in the EC / EFTA bloc from any local rules of jurisdiction and procedure which enable questions of jurisdiction to be raised by defenders at a late stage.

There is of course much more that could be said about this matter. But as art 18 is just one of the provisions of Title II which is potentially applicable in proceedings against domiciliaries of third states, and as the practical significance of the problem is probably small, further discussion here would not be appropriate. The controversy surrounding this aspect of art 18 has been in academic circles much more than in litigation. As most of the contracting states appear to have a domestic provision that as a general rule there is jurisdiction over a defender who enters appearance, the court concerned will normally have jurisdiction on account of either art 18 or the relevant local rule. Which of the provisions is in fact applicable is not likely to be a matter troubling the practitioners involved. But this section should be concluded by stating that in principle the implications of art 18 for parties domiciled in third states are far from clear. Such uncertainties concerning provisions of the Conventions are always undesirable, and it is to be hoped that it will not be long before the European Court is called upon to interpret the article in the present context.

When the Brussels Convention was being drafted, it was considered that special sets of rules ought to apply to contracts of insurance and to consumer contracts. Insured persons and consumers were given special protection in the domestic law of the various contracting states, and similar protection should be extended to them in the Convention.²⁸ Articles 7 - 12A of the Conventions, which form Section 3, are entitled "Jurisdiction in matters relating to insurance". It is provided by art 7 that "jurisdiction shall be determined by this Section, without prejudice to....Article 4". Rules relating to prorogation of jurisdiction are to be found in arts 12 and 12A; the

general rules of jurisdiction are in arts 8 and 11, and what could be seen as special rules are in arts 9 and 10. It is not appropriate to consider jurisdiction in insurance matters at length here, but three points ought to be made.

Firstly, it is clear from their wording that the general rules in arts 8 and 11 are only applicable in the case of defenders domiciled in EC or EFTA states. On account of the wording of the rules and the reference to art 4 in art 7, whether a domiciliary of a third state can be sued in a particular contracting state in a matter relating to insurance will normally be a question for the domestic rules of jurisdiction of the third state. But on the other hand the application of the rules in Section 3 generally does not depend on the domicile of the pursuer. Article 8 para one begins: "An insurer domiciled in a Contracting State may be sued", and art 11 states that as a general rule "an insurer may bring proceedings only in the courts of the Contracting State in which the defendant is domiciled". However art 8 para two provides that

[a]n insurer who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

The existence of an establishment of his in an EC or EFTA state, and the use which he made of it for the transaction giving rise to the action, are considered to justify a person who is domiciled in a third state being treated as domiciled in the EC or EFTA state. Article 5(5) of the Conventions states of course that

[a] person domiciled in a Contracting State may, in another

Contracting State, be sued as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated.

So the policy of the Conventions is to give special protection to persons who have, loosely speaking, done business with a "branch, agency or other establishment". If the person whose branch, agency or other establishment it is is domiciled in another contracting state, the courts of the locus of the establishment will have jurisdiction. The pursuer is likely to be domiciled close to this locus, and so will find it much more convenient to sue in the courts of the locus. As stated above, it was also considered that the Conventions should give special protection to insured persons. Insured persons who had in effect done business with a branch, agency or other establishment were therefore to be permitted to bring proceedings against the insurer in the courts of the state of the establishment even if he, the insurer, was domiciled in a third state. By setting up the establishment in the contracting state and carrying out business there, the insurer domiciled in a third state had in a sense prorogated the jurisdiction of the courts of the state. The Conventions should, it was felt, assure insured persons throughout the EC / EFTA bloc of the right to sue in the courts of the state of the establishment; this matter should not be left to the national law of each of the states.²⁹

The second point is that art 9 provides that

[i]n respect of liability insurance or insurance of immovable property, the insurer may in addition be sued in the courts for the place where the harmful event occurred....

Read on its own, this rule appears to apply to all insurers,

irrespective of their domicile. But in applying this rule the reference to art 4 in art 7 must not be forgotten; it is therefore almost certainly the case that an insurer domiciled in a third state can only be sued in the courts for the place where the harmful event occurred if this is permitted by the domestic rules of jurisdiction of the state in which the place is situated.³⁰

Thirdly, there is the interesting question of whether the rules of prorogation of jurisdiction in art 12 are in principle applicable regardless of the domicile of the defender, or whether they can only be applicable in the event of the defender being domiciled or deemed to be domiciled in the EC / EFTA bloc. According to Collins,³¹

the provisions of Art. 4 can have no application to non-domiciliaries if there is a valid jurisdiction agreement under Arts. 12, 15 or 17: Arts. 12 and 17 both expressly contemplate cases where only one of the parties to the jurisdiction agreement is a domiciliary of a Contracting State

And O'Malley and Layton³² express it in this way:

[I]t seems to be generally accepted that where there is a jurisdiction agreement falling within Articles 12, 15 or 17, giving jurisdiction over a defendant domiciled outside the Community to a court of a Contracting State, the plaintiff should not be deprived of the right to pursue his action by some national rule more restrictive than the rules of the Convention.

In other words, in the opinion of both Collins and O'Malley and Layton art 12 is in principle applicable regardless of the domicile of the defender. Of course the applicability of particular provisions of art 12 might, on account of their terms, depend on the domicile of the defender. It should be said that in a footnote³³ O'Malley and Layton refer to paras 228 et seq of Droz's magnum opus.³⁴ But these paragraphs only concern arts 17 and 18 and, as will be seen, there is

no doubt that what Collins and also O'Malley and Layton state is correct in the context of art 17. But what about the art 12 context?

Article 12 provides:

The provisions of this Section may be departed from only by an agreement on jurisdiction:

- (1) which is entered into after the dispute has arisen, or
- (2) which allows the policy-holder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section, or
- (3) which is concluded between a policy-holder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Contracting State, and which has the effect of conferring jurisdiction on the courts of that State, even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that State, or
- (4) which is concluded with a policy-holder who is not domiciled in a Contracting State, except in so far as the insurance is compulsory or relates to immovable property in a Contracting State, or
- (5) which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 12A.

It is the view of the present writer that, like the general rules in Section 3, art 12 as a whole is only applicable in actions in which the defender is domiciled or deemed to be domiciled in the EC / EFTA bloc. The "provisions of this Section" referred to at the beginning of art 12 are the rules in arts 8 - 11. It is stated in art 7 that these rules are to be read without prejudice to art 4 - in other words they are only applicable in the case of defenders domiciled or deemed to be domiciled in the contracting states. Article 12 sets out rules which are designed to limit the circumstances in which effect will be given to a prorogation agreement concerning an insurance matter. It is submitted that the rules have been designed very much with arts 8 - 11 in mind; they set out the circumstances in which the

parties can "contract out" of the provisions of arts 8 - 11.

The general approach of the Conventions, expressed in art 4, is that jurisdiction over domiciliaries of third states is a matter to be determined by the rules of national legal systems; art 7 makes it clear that this general approach is in principle applicable in the context of insurance matters. It would be somewhat strange if on the one hand the Conventions were saying that as a general rule whether an insurance action could be brought in France against an Argentinian domiciliary was purely a matter for French law, but on the other hand were saying that the French courts would be required to give effect to an agreement entered into by the Argentinian domiciliary falling within one of the categories in art 12. There is much variety in the domestic rules of the EC and EFTA states concerning jurisdiction in insurance matters. The various sets of rules cannot all reasonably be considered to be subject to art 12 in the case of proceedings against domiciliaries of third states. A further argument for the scope of art 12 to be considered restricted to proceedings against defenders domiciled or deemed to be domiciled in the EC / EFTA bloc is to be found below in the discussion of art 17.

The present writer has heard it suggested that if a prorogation agreement was entered into by a domiciliary of a third state after the dispute had arisen, conferring jurisdiction on the French courts, then the French courts would have jurisdiction on account of art 12(1) of the Conventions in proceedings against the third state domiciliary. But for two reasons this, it is submitted, is not the case. Firstly, for the reasons given in the preceding paragraph, art 12 as a whole is inapplicable in proceedings against domiciliaries of

third states. And secondly, where the defender is domiciled in a contracting state and the Conventions set out rules of jurisdiction applicable in insurance actions against him, there are good policy arguments for a provision that these rules may effectively be put aside by a post-dispute, but not a pre-dispute, agreement between the parties. It should not be possible at the stage of an insurance agreement being signed for pressure to be put on the would-be policyholder to "contract out" of the rules of jurisdiction in Section 3. But once the dispute has arisen the policy-holder is no longer in need of this protection.

But on the other hand where the defender is domiciled in a third state and the Conventions leave it to local legal systems within the EC / EFTA bloc to provide rules of jurisdiction applicable in actions against him, there are no such arguments for a provision specifically concerning post-dispute agreements. In this situation, it is submitted, whether or not the agreement does in fact confer jurisdiction on the French courts will be a matter for any other applicable rules of jurisdiction of the Conventions and the domestic rules of jurisdiction of French law. The general rules of prorogation set out in art 17 of the Conventions may clearly be applicable; these will be considered below.

As art 12 as a whole is generally inapplicable in the case of prorogation agreements in insurance matters in which the defender is domiciled in a third state, it is clearly not only para (1) which is inapplicable. Paragraph (5) and art 12A will also generally be irrelevant in proceedings against such defenders. But of course if the defender is an insurer domiciled in a third state but the

business in question took place in an establishment of his in a contracting state, making art 8 para two applicable, and the contract of insurance concerned a risk set out in art 12A, in that case a prorogation agreement would be valid.

So far as paras (2), (3) and (4) are concerned, the following points seem to be of relevance. The "courts other than those indicated in this Section" referred to in para (2) are courts of contracting states. What para two actually means is:

which allows the policy-holder, the insured or a beneficiary to bring proceedings in the courts indicated in this Section or in other courts within the Contracting States.

Article 12 is designed to protect policy-holders; its whole purpose would be defeated if para (2) was interpreted literally as allowing prorogation agreements in any circumstances to take jurisdiction away from the courts given jurisdiction by the earlier provisions of the Section. And the Conventions clearly cannot give effect to prorogation agreements purporting to give jurisdiction to courts of third states.

The precise significance of para (3) is outside the scope of this thesis.³⁵ All that it is necessary to state here is that, unlike the other paragraphs of art 12 so far considered, it is inapplicable in the case of pursuers who are domiciliaries of third states - or, strictly speaking, in the present context, it is inapplicable in the case of pursuers who are not connected - by domicile or habitual residence - with the contracting states.

Paragraph (4), on the other hand, is only applicable in the event of the policy-holder pursuer being domiciled in a third state (ie not

being domiciled in any of the contracting states). It is submitted that for the provision to be applicable, the policy-holder domiciled in a third state must be the pursuer. For, as argued above, the article as a whole is inapplicable if the defender is domiciled in a third state. It is presumably art 12(4) to which Collins is referring³⁶ when he states that art 12 expressly contemplates a case where only one of the parties to the agreement is a domiciliary of a contracting state. But it is submitted that the words of art 12(4) do not cast doubt on the present writer's interpretation of art 12 as a whole. There is nothing incongruous about art 12(4) only being applicable where the policy-holder is the pursuer. Indeed the vast majority of insurance actions are brought by policy-holders rather than by insurers.

The Schlosser Report states³⁷ that "insurance contracts with policy-holders domiciled outside the Community account for a very large part of the British insurance business"; para (4) was added to the Brussels Convention by the 1978 Accession Convention. Schlosser³⁸ comments on the background to this provision:

In view of the great importance for the United Kingdom of the question of agreements on jurisdiction with policy-holders domiciled outside the Community, it was necessary to incorporate the admissibility in principle of such agreements on jurisdiction expressly in the 1968 Convention. If, therefore, a policy-holder domiciled outside the Community insures a risk in England, exclusive jurisdiction may be conferred by agreement on English courts as well as on the courts of the policy-holder's domicile or others.

Insurance companies domiciled in the United Kingdom or elsewhere in the contracting states did not wish to have policy-holder pursuers domiciled in third states making use of all of the rules of jurisdiction in Section 3 - particularly the special rules in arts 9

and 10. As the Brussels Convention is designed primarily to protect persons domiciled in the EC, it was considered not unreasonable as a general rule to allow these insurance companies to restrict the choice of forum of policy-holders domiciled in third states. But such a restriction, it was felt, should not be competent in the event of the insurance in question being compulsory or relating to immovable property. In the case of such types of insurance, there were strong policy arguments for the general rules being in effect unalterable.³⁹

It is now appropriate to turn to the other set of rules concerning a particular type of contract. "Jurisdiction over consumer contracts" is the title of arts 13 - 15; these articles form Section 4. As in the case of arts 7 - 12A, it is provided that "jurisdiction shall be determined by this Section, without prejudice to....Article 4". Article 13 paras one and three concern the scope of the rules, and art 15 concerns prorogation of jurisdiction; the general rules of jurisdiction are to be found in art 13 para two and in art 14. It seems useful to consider firstly the rules of jurisdiction which may be used by consumers, secondly the rules which may be used by suppliers and thirdly the rules of prorogation.

A consumer may base jurisdiction on art 14 para one or, in certain circumstances, on art 13 para two. Article 14 para one provides:

A consumer may bring proceedings against the other party to a contract either in the courts of the Contracting State in which that party is domiciled or in the courts of the Contracting State in which he is himself domiciled.

If a consumer is founding on the first part of the paragraph, whether he is domiciled in a contracting state or a third state is

immaterial. If he is founding on the second part, is the supplier's domicile immaterial? It is often assumed that it is, but this is most certainly not the case. For, as stated above, Section 4 determines jurisdiction "without prejudice to the provisions of Article 4". So use can only be made of the second part of art 14 para one if the defender is also domiciled in a contracting state. If he is domiciled in a third state, whether or not proceedings can be brought against him in the state of the pursuer's domicile is a matter for the domestic law of that contracting state.

Article 13 para two provides:

Where a consumer enters into a contract with a party who is not domiciled in a Contracting State but has a branch, agency or other establishment in one of the Contracting States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

This provision is clearly along the same lines as art 8 para two concerning jurisdiction in insurance matters, quoted above; the justification for art 13 para two is similar to that for art 8 para two. On account of art 13 para two a supplier domiciled in a third state can clearly be treated as domiciled in a contracting state.

Turning to proceedings brought by suppliers, the relevant rule is to be found in art 14 para two. It states:

Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Contracting State in which the consumer is domiciled.

This rule clearly does not provide a basis of jurisdiction against consumers domiciled in third states. And it should be noted that, in contrast to the position with consumers,⁴⁰ a supplier domiciled in the

EC / EFTA bloc does not have a choice of forum not available to a supplier domiciled in a third state.

Article 15, concerning prorogation of jurisdiction in consumer contract actions, provides:

The provisions of this Section may be departed from only by an agreement:

- (1) which is entered into after the dispute has arisen, or
- (2) which allows the consumer to bring proceedings in courts other than those indicated in this Section, or
- (3) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Contracting State, and which confers jurisdiction on the courts of that State, provided that such an agreement is not contrary to the law of that State.

The passages from the works of Collins and of O'Malley and Layton set out above in the context of prorogation agreements in insurance matters refer to art 15 too; it is apparently their view that art 15 too is potentially applicable in all consumer contract actions, regardless of the domicile of the defender. But it is the view of the present writer that art 15, like art 12, can only be of relevance in actions in which the defender is domiciled or deemed to be domiciled in the EC / EFTA bloc. His reasoning is along the same lines as that in the context of jurisdiction in insurance matters. Article 15 has been designed very much with the rules in art 13 para two and art 14 in mind; they are designed to limit the circumstances in which effect will be given to a prorogation agreement "contracting out" of the provisions of these articles. Article 15 is not there to limit the "contracting out" from national rules applicable on account of art 4.

It is only in fact in the context of art 15(1) that the problem is

likely to arise. Article 15(2), on account of its terms, is clearly only applicable in consumer contract actions in which the defender is domiciled or deemed to be domiciled in a contracting state; in other actions no courts are "indicated in this Section". For art 15(3) to be of relevance, both parties must be domiciled or habitually resident in the same contracting state; habitual residence is a little-used concept and it will be rare for this provision to be used in proceedings in which either party is domiciled in a third state without also being domiciled in the EC / EFTA bloc. Article 15(1) is in the same terms as art 12(1), and the present writer would make in the art 15(1) context the comments which he made in the context of art 12(1).

Article 17 contains the principal rules of the Convention concerning prorogation of jurisdiction. Paragraph four of the new version of art 17 of the Brussels Convention, and para three of art 17 of the Lugano Convention, make it clear that art 17 is inapplicable in the context of actions which are within the scope of art 16. And it is provided by these provisions that "[a]greements....conferring jurisdiction shall have no legal force if they are contrary to the provisions of Article 12 or 15". That is why the insurance and consumer contract rules have been considered before attention is turned to art 17. But it is worth mentioning that for an agreement in terms of art 12 or art 15 to be valid, it would appear that there must be compliance with the rules of formal validity to be found in art 17.⁴¹

The first part of art 17 states:

If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or

which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction....

Where such an agreement is concluded by parties, none of whom is domiciled in a Contracting State, the courts of other Contracting States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

On account of para one, if there is a formally valid agreement between an individual domiciled in an EC or EFTA state and an individual domiciled in a third state that the High Court in London will have jurisdiction in actions concerning their contract, the High Court will have jurisdiction - within the EC / EFTA bloc exclusive jurisdiction - in such an action, irrespective of whether or not the defender is the party domiciled in an EC or EFTA state. So long as the action does not fall within the scope of art 16, arts 7 - 12A or arts 13 - 15, the nature and locus of its subject matter are irrelevant. In other words, a defender domiciled in a third state can find himself subject to the jurisdiction, in terms of the Conventions, of one or more courts within the EC / EFTA bloc on account of his prorogation agreement with the pursuer who is domiciled in an EC or EFTA state. His previously entering into the prorogation agreement is seen as justifying this assertion of jurisdiction - he has consented to proceedings being brought in the court seised. Although art 17 is not referred to in art 4, it clearly sets out an exception to the general rule in art 4 that jurisdiction in an action against a domiciliary of a third state is a matter for the domestic law of the contracting state in which it is wished to bring the action.

What if the action concerns an insurance matter within the scope of Section 3 or a consumer contract matter within the scope of Section

4? It is commonly believed that, on account of the reference to arts 12 and 15 in art 17, the opening sentence of art 17 cannot be of any relevance in such actions. But the present writer considers this view to be wrong. As stated above, he considers arts 12 and 15 only to be applicable in proceedings against defenders domiciled or deemed to be domiciled in the EC / EFTA bloc. In the case of such defenders, the first sentence of art 17 is probably inapplicable, but that is a matter outside the scope of this thesis. If on the other hand the defender in an action concerning an insurance matter or a consumer contract is domiciled in a third state, and therefore art 12 / 15 is inapplicable, there is no reason to suppose that art 17 is not applicable. So if in a consumer contract action the pursuer is a Frenchman and the defender is an Argentinian, and there is a prorogation agreement formally valid in terms of art 17 in favour of the tribunal d'instance de Paris, the tribunal will have jurisdiction to hear the action - within the EC / EFTA bloc it will in fact have exclusive jurisdiction.

It is submitted that this interpretation of arts 12, 15 and 17 is in line with the policy of the Conventions to provide protection to persons domiciled within the EC / EFTA bloc. For this interpretation ensures that, provided that the necessary formalities are complied with, any prorogation agreement entered into by a domiciliary of an EC or EFTA state in a contract of insurance or a consumer contract will be recognised and the domiciliary will therefore be able to bring the proceedings within the EC / EFTA bloc - even though the defender is domiciled in a third state.

But if, on the other hand, contrary to the view of the present

writer, arts 12 and 15 were applicable regardless of the domicile - or deemed domicile - of the defender, in that case a pursuer domiciled in the EC / EFTA bloc might very well have a problem if the defender was domiciled in a third state and the prorogation agreement had been entered into before the dispute arose. For art 12(1) / art 15(1) would be inapplicable and, assuming no other provision of art 12 / art 15 to be applicable, the pursuer would be required to find a domestic rule of jurisdiction which enabled him to bring proceedings in one of the contracting states. To be able to rely on art 17 para one in the event of the action concerning a commercial contract (not being a contract of insurance), but not in the event of it concerning a consumer contract, would be anomalous.

The second paragraph of art 17 set out above contains a negative rule. It has been suggested that the various language versions of this provision are not all to precisely the same effect,⁴² but it is probably correct to state that, on account of the provision, if two individuals who are domiciled in third states enter into a contract with a prorogation clause in favour of the English High Court, and an action concerning the contract subsequently becomes necessary, unless and until the English court has been given an opportunity to entertain the proceedings and has declined to do so, jurisdiction in a court of another EC or EFTA state cannot be based on a rule of domestic law of that state.⁴³ Whether the English court can entertain the proceedings is a matter for English law alone, but whether a court of another EC or EFTA state can do so is to be determined by reference to both the local law and the provision of the Conventions set out above. This negative rule set out above constitutes another exception to the general rule in art 4 that jurisdiction in actions

against domiciliaries of third states is purely a matter for the domestic law of the EC or EFTA state where it is wished to bring the action. For although in this context the Conventions do not impose jurisdiction, they can nevertheless effectively take it away.

Article 17 makes no reference to prorogation agreements in favour of courts of third states. Are such agreements of any relevance in considering the jurisdiction of courts of states within the EC / EFTA bloc? This question cannot be answered with any certainty; it will be considered in Chapter 3.

It is appropriate at this point to return to arts 2 - 4; the rules to which their provisions are subject have now been referred to. On account of its importance, art 2 should be set out in full:

Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.

Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

The effect of para one is clearly that if an individual is domiciled in an EC or EFTA state, as a general rule - in other words, if jurisdiction is not determined by one of the sets of provisions which have been considered - proceedings can be brought against him in the courts of that state. So far as the jurisdiction of the courts of the state as a whole is concerned, whether he is also resident or domiciled in, or is a citizen of, a third state (or another EC or EFTA state) is of no consequence. And if on the other hand the defender is a legal person domiciled in an EC or EFTA state, any domicile which it may also have in another state is of no

consequence. In either case, the residence, domicile and nationality of the pursuer are inconsequential. So too is the locus of the subject matter of the proceedings.

Three problems should be mentioned here; the first two have in fact already been alluded to. The first problem arises if the subject matter of the action falls within one of the five categories listed in art 16, but is situated in a third state. If the defender is domiciled in an EC or EFTA state, are the courts of that state obliged to entertain the proceedings on account of art 2? Secondly, if there is a prorogation agreement in favour of a court of a third state, must a court of the EC or EFTA state in which the defender is domiciled nevertheless, on account of art 2, allow the proceedings brought in it (the court of the EC or EFTA state) to go ahead? Finally, if proceedings involving the same subject matter and the same parties - which the present writer refers to as identical proceedings - are taking place in a court of another EC or EFTA state or in a court of a third state, is an otherwise competent court of the EC or EFTA state in which the defender is domiciled nevertheless obliged to entertain the proceedings brought in it? All three problems are commonly regarded as concerning the courts' right to decline to exercise jurisdiction rather than the existence of jurisdiction; they will therefore be considered in Chapter 3.

As a general rule it is for the domestic law of the EC or EFTA state in which the defender is domiciled to determine the particular courts with jurisdiction, but in this context para two of art 2 is of relevance. In the United Kingdom nationality is not a ground of jurisdiction in actions within the subject matter scope of the

Conventions; this provision is therefore of no real relevance there and indeed causes some puzzlement. But the effect of para two seems to be that, in determining the particular courts with jurisdiction in the state in which the defender is domiciled, if either party is domiciled in the state concerned but is not a citizen of it, he is to be treated as a citizen as well as a domiciliary of the state. Of course the defender will be domiciled in the state; the pursuer may or may not also be so domiciled. This provision is principally concerned with domiciliaries of states in the EC / EFTA bloc rather than of third states, and in any event its significance is very limited, only concerning the internal allocation of jurisdiction in certain Continental contracting states. It will not be considered further here.

In art 3, para one contains the general rule that proceedings may only be brought against a domiciliary of an EC or EFTA state in an EC or EFTA state in which he is not domiciled if jurisdiction can be based on one of the grounds set out in Title II of the Conventions. There are listed in para two various rules of exorbitant jurisdiction to be found in EC and EFTA states which cannot provide the basis of jurisdiction in the case of a defender domiciled in another EC or EFTA state. This list is without prejudice to the generality of para one. The article has no significance for domiciliaries of third states.

Article 4 has already been referred to at various points. Its precise terms are as follows:

If the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall, subject

to the provisions of Article 16, be determined by the law of that State.

As against such a defendant, any person domiciled in a Contracting State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in the second paragraph of Article 3, in the same way as the nationals of that State.

Paragraph one makes it clear that, as a general rule, if a defender is domiciled in a third state, whether proceedings can be brought against him in a particular EC or EFTA state is purely a matter for the domestic law of the EC or EFTA state concerned. Whether the locus of the subject matter of the proceedings is of any significance is a matter for that domestic law. It is stated that exceptions to the general rule are to be found in art 16; as has been noted, there are also exceptions to the rule in art 17, and there is a strong argument for art 18 also to be considered as containing an exception. The present writer very much doubts whether further exceptions are to be found in arts 12 and 15.⁴⁴

It should be noted that, on account of art 4 para one, exorbitant rules of jurisdiction may be used not only in proceedings against persons who are domiciled in and citizens of third states, but also against persons who are domiciled in third states but citizens of contracting states. To a Continental lawyer, accustomed to nationality being a significant connecting factor, this may well at first sight seem unfair: Should nationals of EC and EFTA states not be entitled to protection from the various rules of exorbitant jurisdiction? There is in fact a good argument why nationals who are not domiciliaries should not be entitled to this protection. It is that if they were protected in this way, a pursuer might be unreasonably hindered in his attempts to bring proceedings against a

defender in this category. In Jenard's example,⁴⁵

a Belgian national domiciled outside the Community might own assets in the Netherlands. The Netherlands courts have no jurisdiction in the matter since the Convention does not recognize jurisdiction based on the presence of assets within a State. If Article 14 of the French Civil Code could not be applied, a French plaintiff would have to sue the Belgian defendant in a court outside the Community, and the judgment could not be enforced in the Netherlands if there were no enforcement treaty between the Netherlands and the non-member State in which judgment was given.

Of course the basing of jurisdiction on exorbitant grounds can be criticised in principle, but it is submitted that on account of the general approach of Title II, the omission of a special rule concerning citizens of contracting states domiciled in third states was appropriate. For otherwise a pursuer wishing to bring proceedings against a "non-domiciled citizen" would have been in a significantly less favourable position than a pursuer wishing to sue a domiciliary of a contracting state or a national and domiciliary of a third state. Putting non-domiciled citizens into a privileged position could not have been justified. The class of persons who can be sued in the EC / EFTA bloc on account of the basic rule of the Conventions is that of domiciliaries of EC and EFTA states; it would be wrong to have the protection from certain rules given to persons in a larger class.

Like art 2 para two, art 4 para two is somewhat puzzling to British readers. In the United Kingdom there are no rules of jurisdiction designed purely for use by would-be pursuers who are British citizens. Article 4 para two is therefore of no relevance in the context of the jurisdiction of the United Kingdom courts. But its significance can be explained by reference to art 14 of the French

Code civil. Article 14 states that

l'étranger, même non résidant en France....pourra être traduit devant les tribunaux de France, pour les obligations par lui contractées en pays étranger envers des Français.

A French citizen, in other words, may bring proceedings in a French court, concerning a contractual obligation entered into abroad, against a foreigner who is not resident in France. And case law has extended the scope of art 14 well beyond actions concerning contractual obligations.⁴⁶ On account of art 4 para two, a British citizen domiciled in France may, in effect basing jurisdiction on art 14 of the Code civil, also bring proceedings against an individual domiciled in a third state. Indeed any foreigner domiciled in France may make use of art 14 - art 4 para two allows citizens of third states just as much as citizens of other states in the EC / EFTA bloc to do so. It should be said that the rule in art 4 para two, which Jenard⁴⁷ attempts to justify on various grounds, was the subject of much criticism when it was drafted; as will be seen in Chapter 4, it was partly on account of art 4 para two that art 59 was included in the Conventions.

Jenard makes the point that the rule set out in art 4 para two constitutes part of the rule already set out in art 2 para two. It is "a positive statement of the principle of equality of treatment already laid down".⁴⁸ He states that "[a]n express provision was considered necessary in order to avoid any uncertainty".⁴⁹ Of course art 2 para one focuses on defenders, and it is often assumed that para two does too. What are Jenard's justifications for pursuers who are domiciliaries but not citizens being equated with pursuers who are citizens for the purposes of the rules of exorbitant jurisdiction⁵⁰

applicable against domiciliaries of third states?

Firstly, Jenard states⁵¹ that the rule complements the right of establishment to be found in art 52 et seq of the Treaty of Rome. Article 52 states that "...restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages...." It is indeed the case that if citizens of one EC state are to be able fully to carry on business in another EC state they must not be at a disadvantage when they are required to bring an action against a domiciliary of a third state. But of course this does not justify the rule in art 4 para two applying, as it certainly seems to do, to nationals of third states as well as to nationals of other EC states. (Neither art 4 para two nor art 2 para two contains any words which provide that it is inapplicable in the case of nationals of third states.)

Secondly, Jenard justifies the provision on what he terms "economic grounds". He states⁵² that

[s]ince rules of exorbitant jurisdiction can still be invoked against foreigners domiciled outside the European Economic Community, persons who are domiciled in the Member State concerned and who thus contribute to the economic life of the Community should be able to invoke such rules in the same way as the nationals of that State.

This is of course a good argument for art 4 para two applying to nationals of third states as well as to nationals of other EC states. Jenard also comments that as the Brussels Convention "uses domicile as the criterion for determining jurisdiction", it is natural for the Convention to provide that all the domiciliaries of a particular contracting state will have the same rights to bring proceedings in

that state. National and non-national domiciliaries were already treated equally in this respect in four of the first six contracting states; the practical effect of art 4 para two was therefore simply to enable nationals of both other EC states and third states domiciled in the contracting state concerned to make use of art 14 of the French and Luxembourg Codes civils.

Two English cases concerning arts 2 - 4 should be mentioned here. They both focus on the United Kingdom rules of domicile and seat of legal persons and other bodies, to be found in s 42 of the Act. The relevant parts of s 42 are as follows:

(1) For the purposes of this Act the seat of a corporation or association (as determined by this section) shall be treated as its domicile.

.....

(6) Subject to subsection (7), a corporation or association has its seat in a state other than the United Kingdom if and only if -

(a) it was incorporated or formed under the law of that state and has its registered office or some other official address there; or

(b) its central management and control is exercised in that state.

(7) A corporation or association shall not be regarded as having its seat in a Contracting State other than the United Kingdom if it is shown that the courts of that state would not regard it as having its seat there.

In ⁵⁴The Deichland the company in question had been incorporated in Panama and had an official address there. But its central management and control was exercised in the Federal Republic of Germany, and the German courts would have regarded it as having its seat in Germany.

⁵⁵It was held by the Court of Appeal that the company was domiciled in an EC state - FRG - and so jurisdiction in the High Court could not be based on a ground not found in the Brussels Convention; the company's other domicile - in Panama - was irrelevant. In the other

case, The Rewia,⁵⁶ the company concerned had been incorporated in Liberia and had an official address there; its central management and control was exercised in FRG, and it was not shown that the German courts would not regard it as domiciled there. The High Court⁵⁷ followed the decision in The Deichland. The present writer of course considers these decisions to be correct. On account of art 53 para one of the Conventions, it is for each state to determine whether a legal person is domiciled within the contracting states. If it is so domiciled, certain consequences follow regardless of whether in terms of the law of any state it is also domiciled in a third state.

Before concluding this chapter by considering the significance in the context of the Conventions and third states of the rules of "Special jurisdiction" in arts 5 - 6A, one further point should be mentioned. The question is this: If the pursuer, as well as the defender, to an action is domiciled in a third state, are the rules of jurisdiction which constitute exceptions to the general rule in art 4 para one of any relevance? Putting it another way, if both parties to an action are domiciled in third states, is Title II as a whole applicable or not in determining jurisdiction? This question, together with another which will be examined in Chapter 3, was considered in S & W Berisford v New Hampshire Insurance Co.⁵⁸

This was an action in the English High Court against an insurance company which was incorporated in the United States. The company had no domicile in any EC state in terms of the domestic law of that state. It had an office in the City of London, and the dispute concerned contracts of insurance which had been made as part of the business of the London office. The defendant sought to have the

action stayed so that identical proceedings could go ahead in a New York court. It made a forum non conveniens application, arguing that in the circumstances the court should not exercise the jurisdiction which it had in terms of English law. The plaintiffs, on the other hand, maintained that the court had jurisdiction on account of art 8 para two and art 2 para one of the Brussels Convention. The defendant, they argued, was deemed to be domiciled in the United Kingdom by operation of art 8 para two, and so could be sued there by virtue of art 2 para one. The Convention, in their submission, did not allow the court to stay the action on the basis of forum non conveniens.

The judge considered three principal questions. Firstly, in actions such as Berisford where neither of the principal parties is domiciled in an EC state, does Title II of the Convention have any application? Secondly, if Title II is applicable, is it open to the court to stay the action? And thirdly, if a stay is competent, should the discretion be exercised in favour of a stay in the particular circumstances of the case? The first question is of relevance here; the second question will be considered in Chapter 3.

The judge asked what the objects of the Convention are, but his discussion of this matter was unfortunately not particularly well thought-out.⁵⁹ He made reference to the desire of those drawing up the Convention as far as possible to regulate jurisdiction within the EC, and to the fact that art 16 is clearly applicable even if neither party is domiciled in an EC state. He concluded that neither in the Convention nor in the 1982 Act "is there to be found expressly or implicitly the restriction that the defendants seek to impose on the

application and scope of the convention"⁶⁰. This, in the present writer's opinion, is correct; there is no significant school of thought that actions in which neither party is domiciled in the EC are outside the scope of Title II of the Brussels Convention as a whole. No words of the Convention suggest that this is the case, and anyone arguing that the scope of Title II is restricted in this way must explain the significance to him of the rule in art 17 concerning prorogation agreements "concluded by parties, none of whom is domiciled in a Contracting State".

The principal effect of the rules of special jurisdiction in arts 5 - 6A is that in certain circumstances a defender domiciled in an EC or EFTA state may be sued in particular courts of another EC or EFTA state. For example, art 5(1) provides that

[a] person domiciled in a Contracting State may, in another Contracting State, be sued:

in matters relating to a contract, in the courts for the place of performance of the obligation in question.....

For art 5(1) to be applicable, the defender must clearly be domiciled in an EC or EFTA state, and the locus in question must be in an EC or EFTA state - another EC or EFTA state. But, as with the general rule of jurisdiction in art 2 para one, whether the defender is also resident or domiciled in, or a citizen of, a third state is of no consequence. And the residence, domicile and nationality of the pursuer are inconsequential. Whether the court of the locus may in certain circumstances decline to exercise jurisdiction, holding that it would be more appropriate for the proceedings to take place in a court of a third state, will be considered in Section 3. Although it

does not seem necessary to go through each of the parts of arts 5 - 6A, art 6(1) should perhaps be mentioned. It provides:

A person domiciled in a Contracting State may also be sued:

where he is one of a number of defendants, in the courts for the place where any one of them is domiciled.

This provision can clearly enable a defender domiciled in one EC or EFTA state to be sued in another EC or EFTA state by a pursuer domiciled in a third state, in connection with events which took place in a third state.

To conclude this chapter, it might be said that although the rules of jurisdiction of the Conventions are principally applicable in proceedings against persons domiciled in the EC / EFTA bloc, the Conventions nevertheless contain a significant group of rules which can be of relevance in proceedings against persons domiciled in third states. And the Conventions go as far as to provide that nationals of third states domiciled in the EC / EFTA bloc may bring proceedings in the state in which they are domiciled against domiciliaries of third states, making use of national rules of exorbitant jurisdiction which purport to be available only to the citizens of the state. The locus of the subject matter of the proceedings in a third state is in the ordinary case irrelevant, and is never specifically deemed to be a bar to jurisdiction. Whether or not identical proceedings are taking place, or may on account of a prorogation agreement be about to take place, in a court of a third state are matters which have no place in the rules of jurisdiction of the Conventions. And, finally, a pursuer who is domiciled in a third state will find that one or two rules of jurisdiction are not available to him.

3 The Conventions and third states: the declining of jurisdiction

It was stated at the beginning of Chapter 2 that arts 21 - 23 concern the declining of jurisdiction rather than jurisdiction itself. What these articles are providing is that in certain circumstances in which a court has jurisdiction on account of the provisions of the Conventions, it must decline to exercise that jurisdiction; in certain other circumstances it may decline to do so. In this chapter attention will be focused on these articles and also on two or three other jurisdictional issues which it appears to be appropriate to describe as concerning the declining of jurisdiction.

(a) **Identical actions**

Article 21 concerns what the present writer refers to as identical actions, and art 22 concerns what are described as related actions; art 23 contains a special rule relating to the exclusive jurisdiction provisions in art 16. Article 21 states that

[w]here proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States [and] the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

It is provided by art 22 that

[w]here related actions are brought in the courts of different Contracting States....[a] court other than the court first seised may....on the application of one of the parties, decline jurisdiction if the law of that court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.

Article 22 para three contains a definition of "related action"; actions are deemed to be related "where they are so closely connected that it is expedient to hear and determine them together to avoid the

risk of irreconcilable judgments resulting from separate proceedings". One effect of art 21 is clearly that if an action falling within the subject matter scope of the Conventions is brought in a court of another contracting state, and an attempt is then made to bring an identical action in Scotland, the Scottish court must, provided that the jurisdiction of the foreign court is established, decline to exercise its jurisdiction. It no longer has a discretion to allow the action to proceed or to uphold a plea of forum non conveniens. But on the other hand in the context of related actions the second court seised is in certain circumstances given a discretion to decline jurisdiction.

It will have been noted that arts 21 and 22 refer to concurrent proceedings in the courts of two states in the EC / EFTA bloc. One of the questions which is most often asked about these articles is whether, despite their wide terms, they are only applicable if the defender is domiciled in an EC or EFTA state. Reference is sometimes made to art 4 para one: Do the articles contain further exceptions to the rule in this provision? It is submitted that they are applicable in the case of defenders domiciled in third states just as much as in the case of defenders domiciled in EC and EFTA states. And there is no need for them to be regarded as containing exceptions to the rule in art 4 para one. For this provision concerns the existence of jurisdiction, not the declining to exercise a jurisdiction which exists. The English language version of the articles in question talks about the courts declining jurisdiction rather than not having jurisdiction, and in the French version the courts must or may "se dessaisir" rather than declare themselves lacking in "compétence".

In the English case of Overseas Union Insurance v New Hampshire Insurance⁶¹ it was held by the High Court that the art 21 duty to decline jurisdiction exists whether or not the defendant is domiciled in the EC. The case has been referred to the European Court by the Court of Appeal,⁶² but the reference concerns jurisdiction in insurance matters rather than art 21. In the subsequent High Court case of Kloeckner & Co v Gatoil Overseas⁶³ it appears to have been accepted by all concerned that the application of art 21 is not restricted to actions against persons domiciled in the EC. And then in S & W Berisford v New Hampshire Insurance Co⁶⁴ Hobhouse J stated⁶⁵ that he agreed with the decision of Hirst J in Overseas Union Insurance on the application of art 21 to domiciliaries of third states.

In a note on the Overseas Union Insurance case,⁶⁶ Hartley states that the decision "is almost certainly right....[It] is....consistent with the general structure of the Convention".⁶⁷ But, he adds, "[t]hat general structure....is open to question".⁶⁸ Article 21 is designed to prevent there arising the situation in which a court is asked to enforce two irreconcilable judgments. And on account of the provisions of Title III of the Brussels Convention a judgment given by a court of one EC state must be recognised and enforced in the other states irrespective of whether the defendant is domiciled in an EC state or a third state. So it is necessary for the scope of art 21 not to be restricted to actions against persons domiciled in the EC. Hartley points out that art 21 "could produce unfortunate consequences in some cases".⁶⁹ An action might be brought in France against a domiciliary of a third state, with jurisdiction based on art 14 of the Code civil.⁷⁰ The defendant in the French action then

wishes to bring an action in the English High Court against the plaintiff in the French action. Is it fair for him to be precluded from doing so, regardless of the circumstances in which the French action was brought against him?

So far as the "general structure" of the Convention is concerned, there is a "lack of internationalism (outside the narrow circle of Contracting States)"⁷¹. Article 4 enables domiciliaries of third states to be sued on account of rules of jurisdiction not available in the case of defendants domiciled in the EC, art 21 does not allow the exorbitant nature of a rule of jurisdiction to be taken into account in the case of concurrent actions, and Title III in principle requires the enforcement throughout the EC of all judgments - including judgments resulting from the use of an exorbitant rule of jurisdiction - against domiciliaries of third states. The thinking of the present writer on this matter is along the same lines as that of Hartley; art 21 highlights what can be seen as one of the principal weaknesses of the Conventions, a discrimination against domiciliaries of third states.

This section may be concluded with a reference to some comments made by Jenard. He states⁷² that

if a French court is seised of an action between a Frenchman and a defendant domiciled in America, and a German court is seised of the same matter on the basis of Article 23 of the Code of Civil Procedure, one of the two courts must in the interests of the proper administration of justice decline jurisdiction in favour of the other.

In other words, art 21 must be applicable regardless of the domicile of the defender. This is in fact his second justification for art 4 para one. The article "may perform a function in the case of lis



⁷³
pendens". The problem contained in his example

cannot be settled unless the jurisdiction of those courts derives from the Convention. In the absence of an article such as Article 4, there would be no rule in the Convention expressly recognizing the jurisdiction of the French and German courts in a case of this kind.⁷⁴

The present writer is not convinced that, had there been no art 4, art 21 would not have been operative in the case of actions against domiciliaries of third states. But the inclusion of art 4 leaves no room for doubt. If it is the policy of the Conventions (a) as a general rule to leave contracting states to determine the jurisdiction of their courts in proceedings against domiciliaries of third states, and (b) to provide for the free movement of judgments within the EC / EFTA bloc, then art 21 must be applicable to all actions, irrespective of the domicile of the defender.

What is the position if, when an action is brought in a court of an EC or EFTA state, there is an identical or related action already taking place not in a court of another EC or EFTA state but in a court of a third state? At common law the Scottish and English courts have been prepared to consider preventing the proceedings before them continuing in such situations. In England the defendant would probably seek to have the proceedings stayed on the grounds of lis alibi pendens.⁷⁵ But if the proceedings in the United Kingdom were brought instead in a Scottish court, the question would be treated rather as coming under the general heading of forum non conveniens; the defender would seek to have the proceedings sisted.⁷⁶ Despite the terminological differences, in both Scotland and England the court would exercise a discretion. Each case has turned on its own facts, but a consideration of the circumstances held to justify the staying

/ sisting of the proceedings is outside the scope of this thesis.

In the recent English case of Sohio Supply Co v Gatoil (USA),⁷⁷ in which the concurrent proceedings were taking place in Texas and the defendant was domiciled in one or more third states, it was stated by Staughton L J⁷⁸ in the Court of Appeal that "it is inherently undesirable that there should be concurrent proceedings in different jurisdictions, about the same subject matter"; he referred to art 21 of the Brussels Convention but held that, in the circumstances, the proceedings in England, rather than those in Texas, should go ahead. But if the defendant had been domiciled instead in the United Kingdom, is it the case that, on account of art 2 of the Convention, there would have been no scope for argument and an English or Scottish court would have been required to allow the action before it to go ahead? There is no decision of the European Court on this matter, and the question is unfortunately not considered in the Official Reports. The most authoritative dicta may well therefore be those of Droz:

[U]n tribunal compétent au sens des articles 2 et suivants de la Convention peut toujours surseoir à statuer ou se dessaisir à raison de la litispendance existant au profit d'un tribunal étranger à la Communauté.... que son droit commun l'admette en l'espèce.⁷⁹

In other words, a court with jurisdiction on account of art 2 or another article of the Convention may decline that jurisdiction in favour of a court of a third state in which an identical action has already been brought - assuming, of course, that the domestic law of the EC state concerned permits the declining of jurisdiction in these circumstances. Droz was writing, of course, well before the admission of the United Kingdom into the scheme of jurisdiction of the Brussels

Convention; his words certainly suggest that the declining of jurisdiction in favour of a foreign court on account of lis alibi pendens is a course open, in terms of their national law, to courts in at least one or two of the Continental contracting states. Droz has considered the situation in which there is a convention between the EC state and the relevant third state, and also the situation in which there is no such convention:

[I]l faudra....respecter les conventions internationales qui peuvent lier des Etats membres de la Communauté à d'autres partenaires et qui prévoient justement l'exception de litispendance....Mais même en dehors de tout Traité, on ne voit pas pourquoi on empêcherait les Etats dont le droit commun admet la litispendance de la respecter et de parvenir ainsi, dans les relations internationales générales, à cette bonne administration de la justice que la Convention de Bruxelles cherche à réaliser dans le cadre de la Communauté.⁸⁰

So conventions between EC states and third states should be respected, but even where there is no such convention the declining of jurisdiction in cases of lis alibi pendens will contribute to the achieving of justice and should not be prohibited. This seems to be a widely accepted position. Making reference to the works of Continental writers, O'Malley and Layton state⁸¹ that

[t]he compulsory nature of the Convention's jurisdictional rules probably does not operate to prevent a court of a Contracting State from staying its proceedings in favour of a court first seised in a non-Contracting State.

The question arose in the English High Court in Arkwright Mutual Insurance Co v Bryanston Insurance Co;⁸² the judgment has dicta on other questions too, and can more conveniently be summarised below. There are now also dicta of the English Court of Appeal in In re Harrods (Buenos Aires)⁸³ on this point and on the next point to be considered; these dicta will be set out below.

(b) Prorogation agreements

Let us now suppose that no identical or related action is taking place in any court of a third state, but the parties to the action in a court of an EC or EFTA state have previously entered into a prorogation agreement in favour of a particular court of a third state. Article 17, it will be recalled, appears only to be concerned with prorogation agreements in favour of courts of states in the EC / EFTA bloc. At common law a Scottish or English court might very well sist / stay the proceedings before it on account of a prorogation agreement in favour of a court elsewhere. According to Cheshire and North,⁸⁴ "there is a prima facie rule that an action brought in England in defiance of an agreement to submit to a foreign jurisdiction will be stayed". At common law the Scottish approach is similar.⁸⁵ Rule 5(1) of Sched 8 to the Act states that

[i]f the parties have agreed that a court is to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court shall have exclusive jurisdiction.

It is not clear if this rule is applicable in the event of the chosen court being situated outside Scotland. It may well only apply where the chosen court is Scottish, for no provision effectively extends its application outside Scotland. If one compares rule 4, which concerns exclusive jurisdiction and which will be referred to again below, one will note that, in that rule, sub-rule (3) effectively extends the principal rule in sub-rule (1) to proceedings where the locus in question is outside Scotland. But s 49 of the Act states that

[n]othing in this Act shall prevent any court in the United Kingdom from....sisting....or dismissing any proceedings before it, on the ground of forum non conveniens or otherwise, where to do so is not inconsistent with the 1968 Convention.

So provided that the Conventions allow it to do so, a Scottish court is still able, on the basis of forum non conveniens, to decline jurisdiction in circumstances where there is a prorogation agreement in favour of a foreign court - that is, of course, if it is not required to do so by rule 5(1) of Sched 8. If there is a prorogation agreement in favour of a court of another EC or EFTA state, a Scottish or English court clearly must now apply art 17 of the Conventions rather than its domestic law. But if the agreement is in favour of a court of a third state, and the defender is domiciled in the United Kingdom, must the Scottish or English court apply art 2 and entertain the proceedings? Fortunately the Official Reports are not totally silent on this matter. Schlosser states that⁸⁶

[t]here is nothing in the 1968 Convention to support the conclusion that such agreements must be inadmissible in principle. However, the 1968 Convention does not contain any rules as to their validity either. If a court within the Community is applied to despite such an agreement, its decision on the validity of the agreement depriving it of jurisdiction must be taken in accordance with its own lex fori.

Schlosser refers⁸⁷ to the relevant passage in Droz's opus:⁸⁸

Il est certain qu'un....accord [qui désigne le tribunal ou les tribunaux d'un Etat non contractant] n'est pas nécessairement privé d'effet. L'intérêt des parties peut les conduire à élire un for situé hors de la Communauté pour des raisons de neutralité ou de haute technicité de la juridiction.

La validité d'un tel accord sera fonction d'une part de certaines règles impératives de la Convention, et d'autre part des règles du droit commun ou conventionnel classique de l'Etat intéressé.

Il est certain que si l'élection d'un tribunal situé hors de la Communauté déroge aux règles de compétence exclusive dont bénéficierait un Etat de la Communauté, ou viole les dispositions

impératives des articles 12 et 15 en matière d'assurances et de ventes et prêts à tempérament, on ne pourra pas en tenir compte. Mais si l'accord ne déroge qu'à des règles ordinaires de compétence, il pourra être respecté ce qui, dans la pratique, conduira le tribunal exclu à se déclarer incompétent.

Making reference to the dicta of Schlosser and Droz, O'Malley and Layton state that

[i]n general, a court of a Contracting State faced with....a jurisdiction agreement [conferring jurisdiction on a court or courts outside the Contracting States] will be free to decide whether to give effect to the agreement, and to make that decision according to its own law including its conflicts rules.

So there would seem to be little doubt that, if its domestic rules of jurisdiction allow it to do so, a court of a contracting state may, as a general rule, decline jurisdiction in favour of a court of a third state which has previously been chosen by the parties. Droz's words, particularly those in the second paragraph set out above, do imply that declining jurisdiction in these circumstances is something permitted by the domestic rules of certain of the Continental contracting states. It may therefore be a little surprising that Schlosser did not refer to the practice of these states in his passage quoted above. His conclusion, derived apparently simply from the lack of specific guidance either way in the Brussels Convention, is in its context far from convincing.

But, it is submitted, there is indeed a strong case for arguing that where (i) the parties have previously agreed that a court of a third state will have jurisdiction over disputes between them, (ii) the action does not concern any one of the three types of subject matter in which, in the intra EC / EFTA bloc context, prorogation agreements are not recognised at all or are only recognised in limited

circumstances, and (iii) the court agreed upon is prepared to exercise jurisdiction, the court of the EC or EFTA state should, notwithstanding the provisions of the Conventions, be entitled to decline to exercise jurisdiction. Unless there are overriding policy considerations such as exist in the art 16 context, should each party not be required to abide by the agreement which he has previously entered into?

(c) Exclusive jurisdiction proceedings

Before turning to the recent English case law on the Conventions and the courts' discretion to decline jurisdiction - there is as yet no Scottish case law on the subject - something should be said about what can be seen as an indirect effect of the rules of exclusive jurisdiction in art 16. The problem can be explained by reference to art 16(1), which of course concerns, inter alia, actions relating to the ownership of land within the EC / EFTA bloc. It appears settled that at common law the ownership of land outside Scotland could not be the subject of an action in the Scottish courts. According to Erskine,⁹¹ "if the subject in question be immoveable, the judge of the territory where it is situated is the sole judge competent". Duncan⁹² and Dykes stated that the

fundamental rule....that the courts within whose territory the [immoveable] property is situated have exclusive jurisdiction....has met with general, perhaps universal, recognition among modern jurists and legal systems.

They regarded as being relevant in Scotland as well as in England the dicta of Lord Herschell in British South Africa Co v Companhia de Moçambique:⁹³

There appear to me, I confess, to be solid reasons why the courts of this country should...have refused to adjudicate upon claims of title to foreign land.

It is generally assumed that the inability of the Scottish and English courts to entertain actions relating to the ownership of foreign land has not been altered by the Brussels Convention becoming part of Scots and English law. So far as Scotland is concerned, it is felt that the rule is now to be found in rule 4 of Sched 8 to the Act. Rule 4 provides that

(1)the following courts shall have exclusive jurisdiction -

(a) in proceedings which have as their object rights in rem in, or tenancies of, immoveable property, the courts for the place where the property is situated;

.....

(3) No court shall exercise jurisdiction in a case where immoveable property....is situated outside Scotland and where paragraph (1) above would apply if the property....were situated in Scotland.

But s 20 of the Act provides that, in any conflict between the Conventions and Sched 8, the Conventions are to prevail. So is it the case that if an action concerns the ownership of land in a third state, and the defender is domiciled in the United Kingdom, a Scottish court must apply art 2 of the Conventions, rather than rule 4 of Sched 8 to the Act, and entertain the proceedings?

The Official Reports provide no assistance on this matter, and when the Brussels Convention became part of the law in the United Kingdom the present writer felt that, as in the context of lis pendens in a third state, the most useful comments were probably those of Droz. But before turning to Droz's opus, it is worth mentioning that
94
Collins expressed the view that

if the land is situated outside the Contracting States and the defendant is domiciled in a Contracting State, then it would seem that the defendant can be sued in that Contracting State pursuant to art 2.

In Hartley's view,⁹⁵

if the land is in a non-Contracting State and the defendant is domiciled in England....it would seem that effect must be given to art 2.

Collins clearly regarded such a result as undesirable,⁹⁶ and Hartley thought it would be "very unfortunate",⁹⁷ but can it be avoided?

According to Droz, the problem was not noticed when the Brussels Convention was being drafted.⁹⁸ But he believes that

ce serait aller trop loin que de tirer du caractère impératif des règles de compétence posées dans la Convention l'idée qu'en aucun cas un tribunal désigné par les règles ordinaires de compétence pourrait refuser cette compétence et cela même si les éléments retenus à l'article 16 sont situés hors de la Communauté. En effet, les raisons qui ont conduit à l'énumération du catalogue de l'article 16 subsistent dans le cas où les éléments de rattachement sont situés hors de la Communauté. Si le droit commun français veut que les juges français soient incompétents pour trancher un litige relatif à un immeuble situé à l'étranger, les raisons qui militent en France pour cette solution conservent leur valeur.⁹⁹

On account of art 4 an EC or EFTA state may of course, in the event of the defendant being domiciled in a third state, continue to apply its domestic rule prohibiting actions concerning the ownership of foreign land.¹⁰⁰ Droz makes the valid point that

[o]n ne voit pas pourquoi on traiterait le défendeur domicilié en France moins bien que le défendeur domicilié hors de la Communauté alors que l'esprit de la Convention est précisément d'établir des règles protectrices pour les personnes intégrées à la Communauté.

Droz's conclusion is that¹⁰¹

si les éléments de rattachement figurant à l'article 16 sont situés hors de la Communauté, les juridictions des Etats contractants, qui seraient compétentes en vertu d'un chef ordinaire de compétence, pourront néanmoins se déclarer incompétentes si leur droit commun les y autorise.

In other words, notwithstanding the terms of art 2 of the Conventions, courts of contracting states may still, if their domestic law allows them to do so, decline jurisdiction on account of an "exclusive jurisdiction" locus in a third state just as they can do so on account of an identical action in a court of a third state or a prorogation agreement in favour of a court of a third state. The present writer explored this matter in an article in the Scots Law Times.¹⁰² He indicated that he agreed with Hartley that¹⁰³

[i]t would....be a very unfortunate state of affairs if English courts were obliged to give judgments on questions of title to foreign land just because the defendant was domiciled in England....and it is to be hoped that the European Court will interpret the Convention so as to allow national courts to apply their own rules in this matter.

There is no jurisdiction in "foreign land" actions if the defender is domiciled in a third state; in that situation rule 4(3) of Sched 8 is clearly applicable in a Scottish court. To insist on jurisdiction being exercised in "foreign land" actions in which the defender is domiciled in the United Kingdom hardly seems in line with the general policy of the Conventions to give protection to persons domiciled in the EC / EFTA bloc. In his Scots Law Times article the present writer¹⁰⁴ considered four possible interpretations of provisions of Title II of the Brussels Convention which would enable Scottish and English courts to continue to refuse to entertain any proceedings relating to the ownership of land in third states. He rejected an interpretation of art 16 which considered part (1) as applying no matter where in

the world the land in question was situated: such an interpretation would be regarded by the European Court as too liberal. He also rejected interpreting art 2 as empowering and not requiring national courts to entertain proceedings; it is generally accepted that the rules of jurisdiction of the Conventions are mandatory. The interpretation which he felt was most likely to find favour with the European Court was this:

Article 2 in general requires the courts of Contracting States to hear actions where the defender is domiciled in the State and the action is not specifically prohibited by Art. 16, but it does not extend to actions where the subject-matter is within one of the general categories which are covered in part by the provisions of Art. 16 - at any rate where there is a rule of domestic law prohibiting all actions within the general category. (In this case the general category is foreign land; the sub-category is foreign land inside the Contracting States....)¹⁰⁵

In other words, certain types of actions - such as "foreign land" actions in which the locus is in a third state - are outside the scope of art 2. But having given the matter further thought, the writer is now happier with the last of the four possible solutions which he tentatively put forward. It is this:

Article 2 in general requires the courts of contracting states to hear actions where the defender is domiciled in the state and the action is not specifically prohibited by art 16, but it does not go as far as to prevent a court in a contracting state declining to hear a case where the subject matter is within one of the general categories which are covered in part by the provisions of art 16 - at any rate where there is a rule of domestic law prohibiting all actions within the general category.¹⁰⁶

Because Continental courts traditionally have not had a general discretion to decline to exercise jurisdiction - the doctrine of forum non conveniens being at least as a general rule confined to common law systems - in 1987 the writer felt that this last solution would not be likely to appeal to the European Court. But in view of

the academic support on the Continent for the proposition that a court may decline to exercise jurisdiction against a defender domiciled in its territory if there is an identical action taking place in a court of a third state, or if there is a prorogation agreement in favour of a court in a third state, the writer now feels that that the European Court might very well be prepared to regard art 16, like art 21 and art 17, as containing a "signpost" or "springboard" to the declining of jurisdiction in favour of a court of a third state.

It should be mentioned that there is a curious passage in Anton's work on international private law.¹⁰⁷ After wrongly attributing to the present writer the view that Scottish and English courts must now entertain proceedings relating to the ownership of foreign land which are brought against persons domiciled in the United Kingdom, it states that such proceedings need not be entertained because

[t]he Convention is not concerned either to regulate the jurisdiction of the Contracting State in matters which are not within its terms or to regulate the internal jurisdiction of Contracting States in relation to their own domiciliaries.¹⁰⁸

Precisely what is meant by "matters....not within its terms" is unclear; in any event the first part of the quotation seems somewhat tautological. So far as the reference to internal jurisdiction is concerned, whether or not this is correct it is irrelevant. For the question which is at present under consideration is not one of internal jurisdiction. The subject matter is situated in another state, a third state, and the pursuer may be domiciled in another state - another EC or EFTA state or a third state. It is very different from the question which arises if an action is brought by

an individual in London against an individual in Edinburgh concerning events which took place in Manchester. Can an individual who is domiciled in, and a citizen of, Germany not, at least as a general rule, rely on art 2 in order to sue in the United Kingdom someone who is domiciled there? In all the questions concerning the courts' discretion to decline to entertain proceedings, the crucial point may well be that the "competing" court is in a third state rather than another state in the EC / EFTA bloc, but the issue cannot be described as internal.

It may be thought that the question of whether art 16 has a "springboard" effect is unlikely to come before the European Court; on account of the traditional approach in many, if not all, of the contracting states, it will be assumed that, irrespective of the domicile of the defender, "foreign land" actions still cannot be brought in national courts. Not only the serious doubts which there would be as to the existence of jurisdiction, but also the problems involved in the proof of foreign law and the difficulties which would be encountered in trying to enforce a judgment abroad would discourage litigation in the defender's domiciliary courts if the land was situated in a third state.

But it must not be forgotten that art 16 is concerned with much more than the ownership of foreign land. At least certain matters concerning tenancies are covered by art 16(1), but it has not yet been resolved if a straightforward action for payment of rent falls within the scope of the provision.¹⁰⁹ Article 16(2) concerns inter alia the validity of the dissolution of companies, and art 16(3) the validity of entries in public registers. In Sched 8, rules 4(1) (b)

and (c) and 4(3) purport to prohibit in Scottish courts art 16(2)-type proceedings and art 16(3)-type proceedings in which the relevant locus is outside Scotland. So the general problem which has been illustrated by reference to the ownership of foreign land may become the subject of judicial decision in the context of a tenancy, the dissolution of a company or a public register.

It should finally be mentioned that there was in fact the opportunity for the whole matter to be considered by a Scottish court. But that opportunity was not taken. In Ferguson's Tr v Ferguson¹¹⁰ a trustee in sequestration sought to have a bankrupt interdicted inter alia from selling any property in Spain vested in the trustee. It was held that the proceedings had as their object rights in rem in immoveable property and that on account of art 16(1) of the Brussels Convention the court had no jurisdiction. But at the time of the proceedings Spain was a third state, and so art 16(1) cannot have been directly relevant.

(d) The case law on the three particular problems

Having outlined the doctrine concerning identical actions, prorogation agreements and exclusive jurisdiction, all in the context of third states, it is now appropriate to turn to the case law in the United Kingdom. In Arkwright¹¹¹ it was accepted by the defendants that they were domiciled in the United Kingdom in terms of English law. They argued that the action should be stayed in favour of proceedings in a New York court. The New York proceedings had begun first, and so the lis alibi pendens doctrine was applicable. Moreover, they maintained, the New York court was the appropriate forum and so this was also a case of forum non conveniens. The question of forum non

conueniens will be considered below. So far as the lis alibi pendens case is concerned, reference was made in the High Court by Potter J to arts 16 and 17 of the Brussels Convention as well as to art 21. He contrasted art 21 with arts 16 and 17. Looking first at arts 16 and 17, he said that in the case of these provisions

the Convention deals with particular features of certain types of action in respect of which it recognises as a matter of principle that (a) the status and/or nature of the subject matter of the action and (b) the free agreement or consent of the parties as to forum, transcend the otherwise mandatory system and structure of the Convention founded on the defendant's domicile and make it appropriate for one particular jurisdiction only to hear the case."¹²

But, on the other hand,

[i]n the case of art. 21, (lis pendens) the Convention does not identify the peculiar suitability of any particular Court to hear the action by reference to its subject matter or the choice of the parties....It simply requires any Community Court to decline jurisdiction or stay an action where another Community Court is already seised of it. This seems to me no more than a simple order of priority, imposed as a necessary aspect of the certain and orderly regime of jurisdiction and enforcement in and between the Courts of the Community."¹³

The judge's conclusion was that art 21 cannot

be read as more than a circumscribed and necessary component of the scheme of the Convention to simplify enforcement in relation to judgments of the Courts of Contracting States, rather than as a signpost to an exception to the provisions of that scheme [but] it appears that the discretion remains in respect of non-Contracting States in the various categories of case comprehended by arts. 16 and 17."¹⁴

In short, unlike the academic writers such as Collins, Hartley and Kaye to whom he had referred, the judge did not consider "that art. 21 is to be regarded in a similar light to arts. 16 and 17 as "signposts" in favour of a discretion to stay"¹⁵. Unfortunately no reference appears to have been made in the proceedings to Droz or to

any of the other Continental writers. The value of preventing the giving of irreconcilable judgments, one by a court within the EC / EFTA bloc and the other by a court of a third state, appears to have been lost on the judge. It should be mentioned that Collins, in a note on the decisions in Arkwright and Berisford,¹¹⁶ was far from convinced with regard to the distinction made by Potter J in Arkwright.¹¹⁷ He stated that¹¹⁸

[i]f the parties have agreed to the exclusive jurisdiction of the courts of a non-Contracting State, [the judge in Arkwright] seems to accept that the principles of the Convention may be relied on to allow a stay of English proceedings....But if he is right about lis alibi pendens then it is hard to see why it should not follow that the English court would have no power to stay proceedings brought in breach of a clause conferring exclusive jurisdiction on (say) the New York courts.

Finally here, in In re Harrods (Buenos Aires),¹¹⁹ which will be considered more fully in the context of forum non conveniens, Dillon L J, the Court of Appeal judge who gave the leading judgment, referred to the decisions in Berisford and Arkwright and then stated:

Articles 21 and 22 of the Convention are only concerned with the position where proceedings involving the same cause of action and between the same parties, or related actions, are brought in the courts of different Contracting States....Again Article 17 of the Convention provides that if the parties have agreed that the courts of a particular Contracting State shall have exclusive jurisdiction to settle any disputes which may arise in connection with a particular legal relationship, then the courts of that State shall have exclusive jurisdiction to settle such disputes....But if Article 2 has the full mandatory effect which [the judge in Berisford] thought it has, the English courts would be bound to hear and decide an action against a person domiciled in England even though both parties to the action had agreed that the courts of some non-Contracting State - be it New York or Argentina - should have exclusive jurisdiction. Such results would, in my judgment, be contrary to the intentions of the Convention.

The opinion of the Court of Appeal is then that, notwithstanding the terms of art 2 of the Conventions, the English courts are entitled,

on account of a prorogation agreement in favour of a court of a third state, to stay an action brought against a United Kingdom domiciliary. It may be felt that there is an implication in Dillon L J's dicta quoted above that, contrary to what was held in Arkwright, the English courts may also effectively decline jurisdiction in favour of a court of a third state on account of an identical action already taking place in that court. But the reader need not remain in doubt about this matter, or about any implication resulting from the lack of a reference to art 16 and the related third state problem. For as will be seen, the Court of Appeal in fact went very much further than simply holding that, despite the defender's United Kingdom domicile, jurisdiction may be declined on account of a prorogation agreement in favour of a court of a third state.

(e) Forum non conveniens: the academic writing

There was of course no need for the doctrine of forum non conveniens to be considered when the Brussels Convention first entered into force; it is not mentioned in the Jenard Report. But in his book on the Convention Droz did state that "[l]a Convention de Bruxelles ¹²⁰ rejette la théorie du forum conveniens et on s'en félicitera". When the United Kingdom and Ireland entered the schemes of jurisdiction of the Convention, it was then appropriate for consideration to be given to the question of whether the Convention had effectively restricted the ability of the United Kingdom and Irish courts to refuse to entertain proceedings on the grounds of forum non conveniens. In his article commenting on the 1978 Accession Convention, Droz - perhaps not surprisingly in the light of his earlier comment - stated that in the United Kingdom "la doctrine du forum non conveniens [a été]

¹²¹
abandonnée". Believing this to be something of an exaggeration, the
¹²²
present writer published in the Juridical Review an article in which
he examined the matter at some length. He considered the various
circumstances in which a plea of forum non conveniens may be made;
the Court of Session may, for example, be asked to sist proceedings
in favour of a court in another law district of the United Kingdom, a
court in another state in the EC / EFTA bloc or a court in a third
state. He referred to the passage on forum non conveniens in the
Schlosser Report and to various unofficial sources.

Before considering the significance of the academic writing in the
context of the Conventions and third states, it seems appropriate to
make the point that if the common law rules of forum non conveniens
summarised in Chapter 1 were modified on 1 January 1987, this can
only have been on account of the Brussels Convention itself. For s 49
of the Act provides that

[n]othing in this Act shall prevent any court in the United Kingdom
from....sisting....or dismissing any proceedings before it, on the
ground of forum non conveniens or otherwise, where to do so is not
inconsistent with the 1968 Convention.

And it is stated in s 22(1) that

[n]othing in Schedule 8 shall prevent a court from declining
jurisdiction on the ground of forum non conveniens.

¹²³
In the Schlosser Report it is stated that

[a]ccording to the views of the delegations from the Continental
Member States of the Community [the] possibilities [of declining
jurisdiction on the basis of forum non conveniens] are not open to
the courts of those states when, under the 1968 Convention, they have
jurisdiction and are asked to adjudicate....

The view was expressed that under the 1968 Convention the Contracting
States are not only entitled to exercise jurisdiction in accordance

with the provisions laid down in Title 2; they are also obliged to do so.

The delegations from the Continental states referred to are those to the working party set up to consider what adjustments would be required to the Brussels Convention as a result of the United Kingdom, Ireland and Denmark joining the European Community. The words "to the courts of those States" might be somewhat ambiguous, but in the French text the expression used is "aux tribunaux d'un Etat membre de la Communauté", making it clear that the delegations had in mind the courts of the United Kingdom as well as those of their own states. Through reading the whole section it becomes clear that Schlosser supports the delegations' view, and in setting out the arguments for the discretion to decline jurisdiction not being permitted he states that¹²⁴

[a] plaintiff must be sure which court has jurisdiction. He should not have to waste his time and money risking that the court concerned may consider itself less competent than another....Where the courts of several States have jurisdiction, the plaintiff has deliberately been given a right of choice, which should not be weakened by application of the doctrine of forum conveniens.

In Schlosser's opinion¹²⁵

the fact that foreign law has to be applied, either generally or in a particular case, should not constitute a sufficient reason for a court to decline jurisdiction....The practical reasons in favour of the doctrine of forum conveniens will lose considerably in significance, as soon as the 1968 Convention becomes applicable in the United Kingdom and Ireland.

It is submitted that Schlosser's comments generally suggest that the United Kingdom and Irish courts should not decline jurisdiction on the basis of forum non conveniens on account of a court in either another state in the EC / EFTA bloc or a third state being a more

appropriate forum. But his reference in the second sentence of the second last quotation to circumstances in which the plaintiff has been given a right of choice can of course be used by those who wish to argue that Schlosser was all along thinking in terms of the declining of jurisdiction in favour of a court in another contracting state no longer being permitted, and that the declining of jurisdiction in favour of a court of a third state is still permissible.

But that is not the view of Droz. Two sentences of his have already been quoted. In his article concerning the 1978 Accession Convention, Droz agrees with Schlosser that the basic approach of the Brussels Convention has not been changed and states that¹²⁶

[l]orsqu'il y a intégration du litige dans la Communauté en raison du domicile du défendeur....la Convention....établit des règles uniformes de compétence qui ont un caractère impératif....[T]raditionnellement, les systèmes juridiques anglais, écossais, voire irlandais, laissent au juge un très large pouvoir d'appréciation en matière de compétence internationale selon la doctrine du forum (non) conveniens. On peut estimer que....il n'y a plus lieu de tenir compte d'une telle doctrine.

¹²⁷
It is clear from his principal work that he regards the rule in art 2 as being one of the rules which have "un caractère impératif". He is certainly not encouraging the reader to believe that a Scottish or English court which has jurisdiction on account of the defender's domicile in the United Kingdom and in the law district concerned may decline that jurisdiction in favour of a court of a third state.

But what are the views of British writers? It would not be appropriate to survey the whole of the literature on the Conventions and forum non conveniens here, and only the significant points made by the more influential writers will be set out. But it should be

said that it would appear to be the case that whereas the general view is that - irrespective of the rule of the Conventions on which jurisdiction is based - the declining of jurisdiction in favour of a court of another EC or EFTA state is no longer a course open to the Scottish Court of Session or the English High Court, there is no consensus of opinion on the question of whether jurisdiction may be declined in favour of a court of a third state.

In a well-known passage¹²⁸ Hartley concerns himself with the general issue of the Brussels Convention and forum non conveniens. He believes that Schlosser's arguments are

unconvincing to anyone familiar with the way in which English, Scottish and American courts operate the doctrine....The case against the English position does not seem....very strong....[But] as the European Court consists mainly of Continental lawyers, it is by no means certain that the English courts will be allowed to retain their discretion to stay.

And after setting out in his own words the rules in arts 2, 5 and 16,¹²⁹ Anton states that

where a court has jurisdiction under the rules referred to....above, it must exercise its jurisdiction whenever required to do so. The court has no general discretion to decline jurisdiction on the principle of forum non conveniens.

It is worth mentioning that, somewhat curiously, the section on the Brussels Convention and forum non conveniens in Dicey and Morris¹³⁰ is only concerned with the question of whether jurisdiction may still be declined in favour of a court of another EC state.

Cheshire and North would not appear to support the English High Court attempting to decline jurisdiction in favour of a court of a third state:

There are powerful arguments against using a forum non conveniens discretion where the Convention applies, whatever the situation....

It is clear that as the law stands at the moment the court of a Contracting State which has been allocated jurisdiction has no discretionary power to refuse to take it. Moreover, it would not be desirable, in the context of the Convention, to have such a discretion.¹³¹

And Lasok and Stone make their position clear:

[E]fficiency should be promoted by requiring a court which is properly seised to proceed to determine the dispute, and prohibiting it from considering whether some other forum is in some (or even every) way more suitable.

Article 2 merely confers jurisdiction on the courts in general of [a] Member State....[T]he State may provide that in certain....cases more than one of its courts shall be competent, and that one of its courts, when competent and seised in such a case, may exercise discretion, in accordance with a doctrine of forum non conveniens, to decline jurisdiction in favour of another competent court of the same State, though not in favour of a court of another Member or non-member State.¹³²

But, on the other hand, Kaye feels that a distinction can and should be drawn between declining jurisdiction in favour of a court of another EC state and declining jurisdiction in favour of a court of a third state:

The Community does not exist in a vacuum: it cannot simply ignore the existence of competing claims to jurisdiction of non-Contracting States' courts, and conferment of jurisdiction under the Convention upon a Contracting State's courts may also therefore be regarded as bestowal of control over the exercise of that jurisdiction upon those courts, including the power to decline in favour of non-Contracting State jurisdiction.... [J]urisdiction [in terms of inter alia art 2] may be regarded as only being obligatory in relation to competing jurisdiction claims within the Community and under the Convention system, not as regards the entire outside world.¹³³

The present writer's own conclusion in his Juridical Review article was that, although the effect of the 1978 Accession Convention on the doctrine of forum non conveniens was not as great as Droz imagined,

if called upon, the European Court is likely to give a ruling to the effect that, in an action in a Scottish court where jurisdiction is being based on the defender's domicile in the territory of the court, a significant connection - whatever exactly that may mean - with any state other than the United Kingdom will render the Convention applicable and, consequently, the upholding of a plea of forum non conveniens a course unavailable to the court.

It is conceded that, where the defender is an individual and jurisdiction is being based on his domicile in the territory of the court, the possibility of a plea of forum non conveniens succeeding, even if it is still competent, can at best be described as remote. However, where the defender is a public limited company and is domiciled in the territory of the court merely because one of its many places of business is situated there, the problems....are much more likely to occur.¹³⁴

The unlikelihood of the problem occurring in the context of a defender who is an individual may have been exaggerated. Until case law develops on the meaning of "substantial connection" in s 41 of the Act, the possibility of an individual being held to be domiciled where, for example, he has a holiday home is unclear. The present writer referred to Kaye's passage quoted above and submitted that

it is misleading to speak of courts' competing claims. The parties to an action have a much greater interest than the possible forums have in the question of where it should be heard. And, if a United Kingdom court could decline jurisdiction in favour of a United States court, the certainty which Schlosser feels ought to exist within the European Community would clearly be lacking.¹³⁵

(f) Forum non conveniens: the case law

The Juridical Review article was written in the absence of any relevant Scottish or English case law, but shortly after it was published the English High Court decisions in Berisford and Arkwright were reported. As has been seen, in each of these cases the stay was sought in favour of a court of a third state - a New York court. In each case the judge's thinking was along the same lines as that of

the present writer expressed in the Juridical Review article: if the defendant is domiciled in England, the court cannot allow the proceedings to be sisted on the grounds that a court of another state - another EC state or a third state - would be a more appropriate forum. In Berisford Hobhouse J stated that there is¹³⁶

nothing in the convention which contemplated any application of a remedy of stay on the ground of forum non conveniens....[T]here is no provision which so much as hints at the exercise of the power invoked by the defendants. The defendants met this point by explaining that under the legal systems of most of the contracting states....there is no concept of discretionary jurisdiction....

The defendants' acceptance of this situation is fatal to their case. It is clear that the convention is designed (subject to art 4) to achieve uniformity and to "harmonise" the relevant procedural and jurisdictional rules of the courts of the contracting states. The convention leaves no room for the application of any discretionary jurisdiction by the courts of this country; the availability of such a discretion would destroy the framework of the convention and create lack of uniformity in the interpretation and implementation of the convention.

In Arkwright the dicta in Berisford were considered; reference was also made to the relevant passages in four English works on the Brussels Convention.¹³⁷ Potter J concluded:

After careful consideration of the rival arguments, I agree with the decision reached by [Hobhouse J] in the Berisford case to the effect that, for the English Court to retain its former wide discretion in respect of the doctrine of forum non conveniens would be inconsistent with the Convention.¹³⁸

As has already been noted, in Arkwright the defendants' argument concerned lis alibi pendens as well as forum non conveniens; the judge went on to consider art 21 in comparison with arts 16 and 17.

The question of the effect of the Brussels Convention on the doctrine of forum non conveniens has now been considered by the English Court of Appeal in the case of In re Harrods (Buenos Aires).¹³⁹ In this case

there was a petition under s 459 of the Companies Act 1985. Ladenimor sought either an order that Intercomfinanz buy its (Ladenimor's) shares in the Harrods (Buenos Aires) company (Harrods), or the compulsory winding-up of Harrods. Intercomfinanz and Harrods were effectively defendants. Intercomfinanz was a Swiss company; Harrods was incorporated or formed under English law and it had its registered office in England, but its central management and control and all its business activities were in Argentina. Intercomfinanz sought to have the proceedings stayed on the basis of forum non conveniens in favour of an Argentinian court. As Intercomfinanz was not domiciled in the EC, so far as it itself was concerned the question was simply one of whether a stay would be appropriate. But with regard to Harrods, which in terms of English law was domiciled in the United Kingdom as well as in Argentina, the initial question posed in the Court of Appeal was whether it was open to the court to stay the proceedings.

The court was conscious that it was being asked to stay the proceedings in favour of a court of a third state, not another EC state; it was in fact conceded by counsel for Intercomfinanz that it would not have been open to the court to stay the proceedings in favour of a court of another EC state. The court considered the various provisions of the Brussels Convention and the High Court decisions in Berisford and Arkwright. It appreciated that the question of the availability of the forum non conveniens defence depended on the construction of the Convention, and that that was a matter for European law. It made reference to art 220 of the Treaty of Rome and to passages in the Jenard and Schlosser Reports. Dillon L¹⁴⁰ J stated that he found it

difficult to give much weight to the reports in relation to the question with which we are concerned because I do not think that Mr Jenard or Professor Schlosser had that question in contemplation....[T]he Professor was only concerned....with the protection of persons domiciled in the Contracting States and with choices, which should not be on the ground of *forum conveniens*, between the courts of several Contracting States having jurisdiction.

He had noted that the jurisdiction provisions of the Convention were designed to complement the provisions concerning the recognition and enforcement of judgments, and he continued:

For the English court to refuse jurisdiction, in a case against a person domiciled in England, on the ground that the court of some non-Contracting State is the more appropriate court to decide the matters in issue does not in any way impair the object of the Convention of establishing an expeditious, harmonious, and, I would add, certain procedure for securing the enforcement of judgments, since *ex hypothesi* if the English court refuses jurisdiction there will be no judgment of the English court to be enforced in the other Contracting States. Equally and for the same reason such a refusal of jurisdiction would not impair the object of the Convention that there should, subject to the very large exception of Article 4, be a uniform international jurisdiction for obtaining the judgments which are to be so enforced.

Moreover, he said, if the court did not have the power to decline jurisdiction on the ground of *forum non conveniens*, neither would it have the power to do so on the ground of *lis alibi pendens* or on account of a prorogation agreement in favour of a court of a third state. In his judgment, such results "would be contrary to the intentions of the Convention". He concluded:

I do not agree with [the judge in the *Berisford* case] that the framework of the Convention would be destroyed if there were available to the English court a discretion to refuse jurisdiction, on the ground that the courts of a non-Contracting State were the appropriate forum, in a case with which no other Contracting State is in any way concerned. I do not accept that Article 2 has the very wide mandatory effect which [the judge] would ascribe to it where the only conflict is between the courts of a single Contracting State and the courts of a non-Contracting State.

Stocker L J simply agreed with Dillon L J. Bingham L J, who stated that he was in "full agreement" with Dillon L J, said that the question which the court was required to answer was "never squarely addressed" in the Jenard and Schlosser Reports. The "thrust of the reports", in his opinion, supported Intercomfinanz's case much more than Ladenimor's. "I give one example", he continued:

Both reports consider in detail the existence of earlier bilateral or trilateral conventions between contracting states, some of which are indeed listed in Article 55 of the 1968 Convention. Yet, save for [one irrelevant reference], there is (so far as I can trace) no reference to any convention between any contracting state and any non-contracting state. On [the argument of counsel for Intercomfinanz] this is understandable: in the absence of any conflict or potential conflict of jurisdiction between contracting states, the Conventions have no role. If, however, the Conventions govern relations between a contracting state and a non-contracting state even when there is no conflict or potential conflict between contracting states one would expect all conventions to fall for consideration and examination.

It is respectfully submitted by the present writer that, whether or not the European Court would in effect hold that it is open to the High Court to stay proceedings on the basis of forum non conveniens in favour of a court of a third state, the justifications for this being permitted which were put forward by the Court of Appeal judges in Harrods are far from satisfactory. With regard to the first two quotations from the judgment of Dillon L J, one might first make the point that it is far from clear that Schlosser "was only concerned....with choices....between the courts of several Contracting States having jurisdiction"; this matter has already been referred to.¹⁴¹

A further point which can be made with much justification, it is submitted, is that, although the convention which was originally

envisaged was simply a recognition and enforcement convention,¹⁴² in the convention which was finally signed the jurisdiction part and the recognition and enforcement part are of equal weight. Although each part of the Convention may be of guidance in interpreting the other, the role of the rules of jurisdiction in providing litigants with uniformity and certainty throughout the EC is at least as great as their role in providing a satisfactory background to the rules of recognition and enforcement.¹⁴³ A particular practice which runs counter to the provisions of Title II cannot be justified on the basis that it does not result in there being given judgments which are enforceable in terms of Title III!

In addition it should not be forgotten that proceedings in a court of an EC state in which the alternative forum is in a third state may nevertheless be linked to another EC state; although it was not the case in Harrods, the pursuer might, for example, be domiciled in a third state. Are such pursuers not entitled to "protection" - to use Dillon L J's word - against jurisdiction being declined?

Dillon L J then stated that if the court could not stay proceedings on the basis of forum non conveniens, it could not do so either on the basis of lis alibi pendens. This, with respect, just does not follow. Article 21 of the Convention contains a rule relating to lis alibi pendens, just as art 17 contains a rule relating to prorogation agreements; a strong case can therefore be made for national courts being entitled to decline jurisdiction on account of either identical proceedings in, or a prorogation agreement in favour of, a court of a third state. But there is no one article of the Convention to which there can be linked a general power to decline jurisdiction on the

basis of forum non conveniens in favour of a court of a third state.

Bingham L J refers to the bilateral and trilateral conventions signed by EC states which are mentioned in the Convention and in the Official Reports. But the explanation for conventions with third states not being mentioned in art 55 is simply that the article lists the recognition and enforcement conventions which are in effect replaced by Title III of the Convention; because Title III concerns recognition and enforcement within the EC, conventions with third states are not replaced by Title III. And there is absolutely no justification for expecting "all conventions to fall for consideration and examination" in the Official Reports if the Convention does not allow a court of an EC state to decline jurisdiction in favour of a court of a third state. For if the courts of the EC states have no discretionary power to stay proceedings in favour of courts of third states, that is the end of the matter. There is no need for the Reports to consider arrangements for the recognition and enforcement of judgments which EC states have entered into with third states.

In his note¹⁴⁴ on the decisions in Arkwright and Berisford, Collins makes it clear that he is not happy with the decisions. He makes the point that it was not in fact necessary in either case for the court to answer the question of whether it was open to it to stay the proceedings. For in each case it was held that the High Court was the appropriate forum. He clearly believes that decisions such as those in Berisford and Arkwright were not foreseen by those who represented the United Kingdom in the negotiations which led up to the 1978 Accession Convention; he suggests one or two procedural devices which

could be used by the English High Court to mitigate the effects of the decisions. His conclusion is this:

The Convention was intended to regulate jurisdiction as between the Contracting States....Once a court in a Contracting State has jurisdiction it is entitled, vis-à-vis other states, to exercise that jurisdiction and other courts cannot. But the States which were parties to the Convention had no interest in requiring a Contracting State to exercise a jurisdiction where the competing jurisdiction was in a non-Contracting State. The Contracting States were setting up an intra-Convention mandatory system of jurisdiction. They were not regulating relations with non-Contracting States.¹⁴⁵

Collins will undoubtedly be much more satisfied with the decision in Harrods. In fact it is obvious from the judgments in Harrods that Collins' comments were taken into account by the court.

(g) **Forum non conveniens: concluding comments**

In the light of the English case law and the recent academic writing, the present writer has reflected on whether he ought to modify the view which he expressed in the Juridical Review article. But he has not become convinced that the existence of a discretion to decline jurisdiction in favour of a court of a third state is in keeping with the provisions of the Conventions. Schlosser speaks of both the mandatory nature of the rules of jurisdiction and the need for certainty. If an individual who is domiciled in, and a citizen of, one state in the EC / EFTA bloc wishes to sue an individual who is domiciled in another in one of the courts of the state of the would-be defender's domicile, and there is an alternative forum in another state, it is difficult to see what justification there is for a state of affairs in which it is only if the alternative forum is in another EC or EFTA state that the would-be pursuer can be certain that the domiciliary court will entertain the proceedings.

Let us imagine two reparation actions being brought in the High Court in London; in both cases the defendant is domiciled in the United Kingdom and the plaintiff is domiciled in another state in the EC / EFTA bloc. The harmful event which gave rise to one of the actions took place in another EC or EFTA state; the harmful event giving rise to the other took place in a third state. Is it fair for the High Court effectively to be able to send the plaintiff in one action to a court of a third state, but not to be able to send the plaintiff in the other to a court of another EC state? There would in fact appear to be a case for saying that if the declining of jurisdiction is to be permitted at all, it should be permitted in intra EC / EFTA bloc actions but not in actions in which the alternative forum is in a third state; decisions of national courts of EC states – and even of EFTA states – can be supervised in a way in which decisions of courts of third states can not. But there is little doubt that the European Court would not sanction the declining of jurisdiction in favour of a court of another EC state.¹⁴⁶

An argument that the declining of jurisdiction on the basis of forum non conveniens in favour of a court of a third state is still permissible may be based on the decision of the European Court in Kongress Agentur Hagen v Zeehaghe.¹⁴⁷ In this case it was held that a national court could apply its own rules of procedure and refuse to entertain proceedings against a third party in terms of art 6(2) of the Brussels Convention. But it is the present writer's view that the European Court's separation of procedural matters from matters determined by the Convention must be seen in its context. Article 6(2) is setting out a somewhat special ground of special

jurisdiction; the significance of art 2, which contains the principal ground of jurisdiction in the Convention, is immeasurably greater. Moreover in applying the relevant procedural rules in Kongress Agentur Hagen the national court was, it would appear, simply mechanically applying what had been laid down some time before. But in Harrods, on the other hand, the Court of Appeal was exercising a discretion, with all the uncertainty which that entailed for everyone concerned.

It is submitted that it is possible to make a case for distinguishing between proceedings which are brought by individuals who are domiciled in EC or EFTA states on the one hand, and proceedings brought by individuals who are domiciled in third states on the other. It can be argued that the protection of the Community and of the EC / EFTA grouping as a whole need not be extended to persons who do not have strong links with an EC or EFTA state and that, in proceedings brought by such a person, a national court of an EC or EFTA state should be able to decline jurisdiction in favour of a court of a third state. But such a discriminatory approach could be attacked as both wrong in principle and unworkable in practice. The Conventions and the Official Reports place very little emphasis on pursuers' ties, and the effective setting up of two categories of pursuers could lead to a cumbersome body of case law.¹⁴⁸

Because of this, because being able effectively to require pursuers to turn to courts of third states but not to courts of other states in the EC / EFTA bloc can lead to anomalous situations, because forum non conveniens is only known to the legal systems of two of the EC states, and because there are good arguments against the doctrine of

forum non conveniens as a whole, the present writer does not believe that the European Court is likely to hold that national courts are entitled to decline jurisdiction on the basis of forum non conveniens in favour of courts of third states in any actions in which they have jurisdiction on account of art 2 or another provision of the Conventions. But on account of the existence of the provisions of arts 21 - 23, 17 and 16 concerning intra EC / EFTA bloc matters, there is indeed a very strong case for national courts being entitled to decline jurisdiction in the event of there already taking place an identical action in a court of a third state, there existing a prorogation agreement in favour of a court of a third state, or there being raised a question which would be resolved by art 16 in the event of the relevant locus being in an EC or EFTA state.

In conclusion it might be said that much uncertainty surrounds the question of the extent to which courts within the EC / EFTA bloc may decline jurisdiction in favour of courts of third states; it might be argued that the Conventions contain hidden rules allowing jurisdiction to be declined in three particular types of situation. Whether United Kingdom courts can decline jurisdiction on the basis of forum non conveniens in favour of a court of a third state in the event of the defender being domiciled in the United Kingdom, and the pursuer being domiciled in a third state or even in another state in the EC / EFTA bloc, is a matter which has yet to be resolved by the European Court.

4 The Conventions and third states: the recognition and enforcement of judgments

Recognition and enforcement is the subject of Title III of the Conventions. The Title contains arts 25 - 49. Article 25 defines a "judgment" as "any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court". Articles 26 and 31, quoted in Chapter 1 of this **Part**, set out the principles of recognition and enforcement of judgments in terms of the Conventions. Articles 27 - 29 and 34 are concerned with the grounds on which the recognition and enforcement of a judgment may be refused, and procedural matters are the subject of arts 30, 32 and 33, and 35 - 49.

It is clear from arts 26 and 31 that, as a general rule, provided that the various procedural requirements are satisfied, a judgment given by a court of one EC or EFTA state should be recognised and enforced in another EC or EFTA state. This principle is of course in keeping with both art 220 of the Treaty of Rome and the Preamble to the Conventions. It was on account of art 220 that the negotiations which led to the Brussels Convention were instituted. The relevant part of the article provides that

Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:

the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.

And then in the Preamble to the Brussels Convention it is stated that

[t]he High Contracting Parties to the Treaty establishing the European Economic Community,

Desiring to implement the provisions of Article 220 of that Treaty by virtue of which they undertook to secure the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals;

.....

Considering that it is necessary for this purpose....to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgments....

Have decided to conclude this Convention....

For the European Economic Community fully to come into effect, it was considered that general rules relating to recognition and enforcement would be necessary.¹⁴⁹ Certain exceptions to these general rules would be inevitable, but these should be as few as possible. The nationality, residence and domicile not only of the pursuer but also of the defender should at least as a general rule be irrelevant. So too should be the ground of jurisdiction of the court which gave the judgment. The Common Market could not function properly if certain pursuers were at a disadvantage when it came to the enforcing of judgments, or if pursuers were at a disadvantage when it came to the enforcing of judgments against certain classes of defenders. Finally here, it need hardly be specifically stated that Title III is not concerned with the recognition and enforcement of judgments of courts of third states; whether a judgment of a court of a third state should be recognised and enforced in a particular EC or EFTA state is purely a matter for the law of that state.

At least as a general rule, a court of an EC or EFTA state may not refuse to recognise and enforce a judgment of a court of another EC

or EFTA state on account of a local rule of recognition and enforcement. Article 34 para two provides that an "application [for enforcement of a judgment] may be refused only for one of the reasons specified in Articles 27 and 28"; it seems highly likely that the European Court would hold that, in the normal case, recognition of a judgment too may be refused only on account of one of the provisions of arts 27 and 28. The words "in the normal case" are used because there are probably highly unusual circumstances not envisaged by arts 27 and 28 in which it would be open to - perhaps in fact necessary for - the appropriate court of the state in which enforcement is sought to refuse to allow that enforcement.¹⁵⁰

It will be seen that there is no exception in art 27 or 28 which specifically provides that a judgment need not be recognised and enforced if it was given in an action against a defender domiciled in a third state and jurisdiction had been based on a rule of exorbitant jurisdiction. So in principle such judgments given in one contracting state can be recognised and enforced in any other contracting state just as easily as judgments given against domiciliaries of contracting states. In the section of his Report on art 4, Jenard¹⁵¹ states that

in order to ensure the free movement of judgments, this Article prevents refusal of recognition or enforcement of a judgment given on the basis of rules of internal law relating to jurisdiction. In the absence of such a provision, a judgment debtor would be able to prevent execution being levied on his property simply by transferring it to a Community country other than that in which judgment was given.

The present writer is not convinced that the absence of art 4 from Title II would have had the effect of judgments given against

domiciliaries of third states not being enforceable in terms of Title III. Articles 26 and 31 do not appear to contain any express or implied limitation on recognition and enforcement. But reading art 4 along with arts 26 and 31 makes it quite clear that as a general rule judgments are to be enforced irrespective of the ground of jurisdiction and the domicile of the defender.

What are the grounds for refusal of recognition and enforcement which are relevant in a work on the Conventions and third states? It should perhaps first be mentioned that art 29, which concerns recognition, provides that "[u]nder no circumstances may a foreign judgment be reviewed as to its substance". Article 34 para three, concerning enforcement, is in virtually identical terms. It is provided by art 28 para three that, other than in certain limited circumstances which will be considered below, "the jurisdiction of the court of the State of origin may not be reviewed". This provision could be regarded as making it clear that the omission from arts 27 and 28 of a general ground of refusal of recognition on account of the ground of jurisdiction was deliberate. There are in all seven grounds for refusal of recognition and enforcement of a judgment set out in arts 27 and 28.

Of the five grounds in art 27, the first one is that recognition and enforcement would be "contrary to public policy in the State in which [they are] sought". But it should be noted that art 28 para three provides that "the test of public policy referred to in point 1 of Article 27 may not be applied to the rules relating to jurisdiction". Article 28 para three, in other words, makes it clear that art 27(1) does not justify the refusal of recognition and enforcement of a

judgment against a domiciliary of a third state on the ground that it would be contrary to public policy to recognise and enforce the judgment on account of the jurisdiction of the court of the state of origin having been based on an exorbitant rule. It should, however, be said that, despite the terms of art 28 para three, it is not unknown for courts of EC states to enquire into the jurisdiction of the court of the state of origin in circumstances other than those in which this is permitted by the Convention. Recognition and enforcement, it seems, are in practice from time to time refused on account of the exorbitant nature of the ground of jurisdiction used in the proceedings against a domiciliary of a third state.¹⁵² Such refusal would appear to provide good grounds for a motion that the case be sent to the European Court for interpretation of certain provisions of Title III.

The second ground for refusal in art 27 arises where the judgment "was given in default of appearance"; it is that the defender "was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence".¹⁵³ The particular significance of this provision in the context of actions concerning third states is this. In Title II, art 20 para two provides:

The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

It should be mentioned at this point that, on account of art 20 para three, if the document in question has been transmitted abroad in accordance with the provisions of the 1965 Hague Convention on the

service abroad of judicial and extrajudicial documents in civil or commercial matters, art 20 para two is in effect replaced by art 15 of the Hague Convention; the relevant terms of art 20 of the Brussels Convention and art 15 of the Hague Convention are very similar. Where the Hague Convention is inapplicable, art 20 para two appears to be applicable regardless of the domicile of the defender. But art 20 para one begins: "Where a defendant domiciled in one Contracting State is sued in another Contracting State and does not enter an appearance....", and it is generally believed that these words should be considered as coming at the beginning of para two too.

If this is correct, the rule that the proceedings should be stayed until it is shown that the defender has had an opportunity to take the necessary steps to defend the action is not applicable in the case of a defender domiciled in a third state. But even if an action against a defender domiciled in a third state can proceed to judgment without his having had an opportunity to prepare his defence, such a judgment cannot be enforced in another EC or EFTA state. For art 27(2) contains a provision generally parallel to that of art 20 para two, and the art 27(2) provision is neither expressly nor implicitly limited in scope to actions against defenders domiciled in EC and EFTA states.

The third and fourth grounds for refusal in art 27 are of no particular significance in the present context. But art 27(5), which was introduced into the Brussels Convention by the 1978 Accession Convention, provides:

A judgment shall not be recognized if the judgment is irreconcilable with an earlier judgment given in a non-contracting State involving

the same cause of action and between the same parties, provided that this latter judgment fulfils the conditions necessary for its recognition in the state addressed.

So if a United Kingdom court is asked to recognise and enforce a judgment of a court of another EC or EFTA state, recognition and enforcement should be refused if the judgment cannot be reconciled with a judgment which (a) was given by a court of a third state, (b) was given prior to the giving of the judgment by the court of the EC or EFTA state, (c) has the same cause of action, (d) is between the same parties and (e) is entitled to recognition in the United Kingdom. In the Schlosser Report it is stated¹⁵⁴ that this provision arose out of the need to avoid the "diplomatic complications" which would ensue if an EC state was obliged, in terms of a bilateral convention, to recognise a judgment of a third state and, in terms of Title III of the Brussels Convention, to recognise a later judgment of another EC state which was in conflict with that judgment.

In Schlosser's example

[a] decision dismissing an action against a person domiciled in the Community is given in non-contracting State A. A Community State, B, is obliged to recognize the judgment under a bilateral convention. The plaintiff brings fresh proceedings in another Community State, C, which is not obliged to recognize the judgment given in the non-contracting State. If he is successful, the existing text of the 1968 Convention leaves it open to doubt whether the judgment has to be recognized in State B.¹⁵⁵

But the new text of Title III leaves the court in no doubt. The wide terms of art 27(5) in fact mean that certain judgments given by courts of other states in the EC / EFTA bloc should not be recognised even though their recognition would not lead to "diplomatic complications" with third states. For the judgment of the court of the third state has priority even if it is only entitled to

recognition in the EC or EFTA state concerned on account of a rule of domestic law of that state - in other words, even if no bilateral convention is involved. Schlosser explains that, in order to avoid unnecessary discrepancies, the text of art 27(5) has been based on art 5 of the 1971 Hague Convention on the recognition and enforcement of foreign judgments in civil and commercial matters.

The two remaining grounds for refusal of recognition and enforcement are to be found in art 28 para one. The first is that the judgment "conflicts with the provisions of Sections 3, 4 or 5 of Title II". These sections concern, of course, respectively, jurisdiction in insurance matters, consumer contract jurisdiction and exclusive jurisdiction. This exception to the general rule that the court in which recognition and enforcement are sought should not review the jurisdiction of the court of the state of origin is justified in the Jenard Report on the basis that in the original six contracting states the rules of jurisdiction concerning the subject matter of sections 3, 4 and 5 of Title II are "either of a binding character or matters of public policy". The effect of this ground of refusal is clearly that by submitting that, on account of Section 3, 4 or 5 of Title II, the first court could not have jurisdiction over him, the defender against whom judgment has been given can require the second court involved to consider the jurisdiction of the first court. Such a consideration could, of course, result in a considerable delay in the giving of the decision by the second court as to whether enforcement can take place. Admittedly, art 28 para two provides that

[i]n its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the State of

origin based its jurisdiction.

But even a debate on the law cannot take place at a few days' notice. It is clearly possible that in the second court a defender will try to thwart the intended smooth operation of Title III by making one or more dubious points concerning the relevance of Section 3, 4 or 5 to the jurisdiction of the first court. Such an abuse of the rule in art 28 para one might be most likely to be made by a defender domiciled in a third state who had been sued on the basis of a rule of exorbitant jurisdiction, who felt that the approach of the Conventions to domiciliaries of third states was unfair and who wished at the very least to prolong the proceedings. If an abuse of the rule of this nature were to occur, but it was felt that the rule in art 28 para one should remain in the Conventions, it would probably be most appropriate for consideration to be given to whether a more expeditious procedure for resolving disputes of this nature could be introduced in the court concerned and, perhaps, in courts in other contracting states.

Finally, art 28 para one provides that "a judgment shall not be recognized....in a case provided for in Article 59". The text of art 59 is as follows:

This Convention shall not prevent a Contracting State from assuming, in a convention on the recognition and enforcement of judgments, an obligation towards a third State not to recognize judgments given in other Contracting States against defendants domiciled or habitually resident in the third State where, in cases provided for in Article 4, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3.

However, a Contracting State may not assume an obligation towards a third State not to recognize a judgment given in another Contracting State by a court basing its jurisdiction on the presence within that State of property belonging to the defendant, or the seizure by the plaintiff of property situated there:

1 if the action is brought to assert or declare proprietary or possessory rights in that property, seeks to obtain authority to dispose of it, or arises from another issue relating to such property; or

2 if the property constitutes the security for a debt which is the subject-matter of the action.

As stated above, the recognition and enforcement of a judgment of a court of an EC or EFTA state should not be refused in another EC or EFTA state on the ground that jurisdiction against the defender domiciled in a third state was based on an exorbitant rule. If the defender is domiciled in a third state, the judgment should be recognised and enforced even though the jurisdiction of the court of the state of origin was based, for example, on the pursuer being a citizen of the state in which the court is situated. This effect of the provisions of arts 4 and 28 of the Brussels Convention has been¹⁵⁸ described as constituting "discrimination against the outside world" on the part of the EC. If an individual domiciled in a third state is sued in an EC state, with jurisdiction being based on an exorbitant rule, and he has assets in another EC state, as a general rule he cannot ignore the proceedings. For any judgment given against him can be enforced in terms of Title III in the state in which his assets are situated. "Such unfairness to the defendant as there may be in his being subjected to an exorbitant jurisdiction", it has been said,¹⁵⁹ "is multiplied by the judgment-extending effect of Title III."

When the Brussels Convention was being drafted, concern about this matter was expressed by the United Kingdom (which of course was not a party to the negotiations) and, more strongly, by the United States. The response of the original six contracting states was to include¹⁶⁰ art 59 para one in the Convention. This provision enables an EC state

to conclude a convention with a third state, agreeing not to recognise and enforce judgments of courts of other EC states which are against persons domiciled or habitually resident in the third state and which have resulted from the use of an exorbitant rule of jurisdiction listed in art 3 para two. Article 59 para one can be seen as a "compromise solution", designed to "lessen the effects within the Community of judgments based on rules of exorbitant jurisdiction"¹⁶¹. There is now to be found in art 59 of the Lugano Convention provisions identical to those of art 59 of the Brussels Convention. Article 59 sets out an exception to the general rules of recognition and enforcement in arts 26 and 31, and to the rule in art 28 prohibiting review of the jurisdiction of the state of origin; it was therefore appropriate for a reference to art 59 to be included in art 28.

Six points concerning art 59 para one seem worth making here. Firstly, as stated above, art 52 of the Conventions contains no choice of law rule to be applied in ascertaining whether or not a natural person is domiciled in a third state. Nor is there any provision of relevance in art 59 itself. It appears to be left to the EC or EFTA state and the third state to agree on a meaning of domicile in their "article 59" convention. Whether this was deliberate or an oversight is not clear.¹⁶² Secondly, the term habitual residence was included because in certain third states - particularly common law ones - the concept of habitual residence is much closer than the concept of domicile is to the Continental concept of domicile. So the EC or EFTA state can agree not to recognise and enforce judgments given against persons habitually resident in the

third state concerned where these judgments are the result of
jurisdiction being based on an exorbitant ground.¹⁶³

Thirdly, "domiciled....in the third State" means of course "domiciled in the third State and not in any EC / EFTA State". For if an individual is domiciled in a state in the EC / EFTA bloc and also in a third state, he cannot in any event be sued in an EC or EFTA state in which he is not domiciled on the basis of a rule of jurisdiction listed in art 3 para two. For these rules cannot be used in the case of defenders domiciled in any of the contracting states. And if an individual who is domiciled in a state in the EC / EFTA bloc and also in a third state is sued in a particular court of the EC / EFTA state on account of a rule of exorbitant jurisdiction listed in art 3 para two which links him with the territory of that court - something which would appear to be competent in terms of the Conventions and which is probably most likely to occur in the United Kingdom context - the use of the rule of exorbitant jurisdiction would not, it is submitted, allow the ensuing judgment to be refused recognition and enforcement on account of an "article 59" agreement. For at the international level the judgment was founded on art 2, not the rule of exorbitant jurisdiction, and in addition the policy of the Conventions is to allow domiciliaries of contracting states to be sued within the EC / EFTA bloc regardless of their ties with third states.

Fourthly, a defender can only make use of art 59 if jurisdiction against him in the court of the EC or EFTA state was based on an exorbitant rule listed in art 3 para two and could not have been based on any other rule. The list in art 3 para two is far from

exhaustive. Fifthly, the extent to which the wording of the "article 59" convention must follow that of art 59 is not clear; there certainly seems to be no need for the "article 59" convention to refer to the Brussels and Lugano Conventions. Finally, it has been suggested that the agreement between the EC or EFTA state and the third state can be restricted in its scope to certain exorbitant rules of jurisdiction and certain categories of defenders.¹⁶⁴

Paragraph two of art 59 was added to the Brussels Convention by the 1978 Accession Convention; it is of course also to be found in the Lugano Convention. On account of art 59 para two, an EC or EFTA state may not undertake to refuse recognition and enforcement of judgments which have been given in certain circumstances. According to the Schlosser Report,¹⁶⁵ para two was added "further to limit the possibility of recognition and enforcement". But of course its effect is precisely the opposite - to limit the possibility of refusing recognition and enforcement. But on the other hand the comment which O'Malley and Layton make on art 59 para two seems reasonable. After stating that exorbitant jurisdictions listed in art 3 para two for Denmark, Germany and the United Kingdom "permit jurisdiction to be founded on the location of property", they continue:

[W]here that property is connected with the dispute in a way which is not capricious, the policy of Article 59 does not regard the jurisdiction as sufficiently unfair to allow Contracting States to contract out of it by way of a bilateral convention with a third country.

But of course the point can be made that the amendment in the 1978 Accession Convention has not provided a satisfactory solution to one of the central problems of art 59. There are rules of exorbitant jurisdiction not listed in art 3 para two, and a strong case can, it

is submitted, be made for a provision that an "article 59" agreement may cover any rule of exorbitant jurisdiction, or any rule of exorbitant jurisdiction other than one which involves the arrestment or the situation of property with which the action is closely concerned. It seems useful at this point to set out the provisions of art 3 para two which concern rules of exorbitant jurisdiction in the United Kingdom. They are:

the following provisions shall not be applicable as against [persons domiciled in a Contracting State]:

.....

- in the United Kingdom:

the rules which enable jurisdiction to be founded on:

- (a) the document instituting the proceedings having been served on the defendant during his temporary presence in the United Kingdom; or
- (b) the presence within the United Kingdom of property belonging to the defendant; or
- (c) the seizure by the plaintiff of property situated in the United Kingdom.

One combined effect of paras one and two of art 59 is that another EC or EFTA state may agree with a third state that it will not recognise and enforce any judgments which have been given in Scotland against persons domiciled or habitually resident in that third state and which have been given in actions in which jurisdiction was based on one of various rules in Sched 8 to the Act. In the Scottish context, part (a) of the United Kingdom section of art 3 para two might well be held to relate to rule 2(1) in Sched 8, that a person may be sued "where he has no fixed residence, in a court within whose jurisdiction he is personally cited". Admittedly the category of circumstances envisaged by the provision in art 3 para two is

different from that referred to in rule 2(1). But there is an overlap, and if rule 2(1) was used in circumstances envisaged by the words in art 3(2) then it might very well be that recognition and enforcement could be refused. But this is not a serious practical problem; the number of occasions on which rule 2(1) will be used is clearly extremely small.

So far as part (b) at the end of art 3 para two is concerned, rule 2(8)(b) in Sched 8 appears to be of relevance:

[A] person may....be sued where he is not domiciled in the United Kingdom, in the courts for any place where any immoveable property in which he has any beneficial interest is situated.

And rule 2(8)(a) appears to correspond to part (c):

[A] person may....be sued where he is not domiciled in the United Kingdom, in the courts for any place where any moveable property belonging to him has been arrested

It might at first sight be wondered whether actions in which jurisdiction is based on rule 2(9) or 2(11) could in certain circumstances be considered to be within the ambit of part (b) at the end of art 3 para two. Rule 2(9) states that a person may be sued

in proceedings which are brought to assert, declare or determine proprietary or possessory rights, or rights of security, in or over moveable property, or to obtain authority to dispose of moveable property, in the courts for the place where the property is situated.

And the equivalent words in rule 2(11) are:

in proceedings concerning a debt secured over immoveable property, in the courts for the place where the property is situated.

But the problem is theoretical. For on account of art 59 para two

another state in the EC / EFTA bloc cannot enter into an "article 59" convention agreeing not to recognise and enforce judgments given in actions in which jurisdiction was based on one of these grounds.

With regard to the English rules of jurisdiction, it should be said ¹⁶⁷ that there may be an agreement that the state in the EC / EFTA bloc will not recognise and enforce any judgments which have been given in England against persons domiciled or habitually resident in the third state and which have been given in actions in which jurisdiction was based on the defendant's being served with the summons during his temporary presence in England. But of course ¹⁶⁸ it is only as regards actions which are not concerned with the property that the other EC or EFTA state can agree not to recognise and enforce judgments which result from jurisdiction being based on the presence in England of property belonging to the defendant.

The United Kingdom has now entered into "article 59" conventions with Canada and Australia, states with which it has of course many ties. The convention with Canada, which came into force on 1 January 1987, is in fact concerned with much more than art 59 of the Brussels Convention; it is a general convention for the reciprocal recognition and enforcement of judgments, effectively given force of law in the United Kingdom by Statutory Instrument made in terms of the Foreign ¹⁶⁹ Judgments (Reciprocal Enforcement) Act 1933. In addition to the provisions which are to be expected in a bilateral recognition and enforcement convention, there is to be found as art IX:

1 The United Kingdom undertakes, in the circumstances permitted by Article 59 of the 1968 Convention, not to recognise or enforce under that Convention any judgment given in a third State which is a Party to that Convention against a person domiciled or habitually resident in Canada.

2 For the purposes of paragraph (1)

(a) an individual shall be treated as domiciled in Canada if and only if he is resident in Canada and the nature and circumstances of his residence indicate that he has a substantial connection with Canada; and

(b) a corporation or association shall be treated as domiciled in Canada if and only if it is incorporated or formed under a law in force in Canada and has a registered office there, or its central management and control is exercised in Canada.

The definition in para 2(a) is of course along the same lines as that concerning domiciles of natural persons in third states which is to be found in s 41(7) of the Act. And, apart from the omission of the words "or some other official address" after "a registered office", the definition in para 2(b) is along the same lines as that concerning legal persons and other bodies which is to be found in s 42(6) of the Act.

Section 9(2) of the Act provides that

Her Majesty may by Order in Council declare a provision of a convention entered into by the United Kingdom to be a provision whereby the United Kingdom assumed an obligation of a kind provided for in Article 59.

170

As a result, art 7(b) of the Reciprocal Enforcement of Foreign Judgments (Canada) Order 1987 states:

It is hereby declared that Article IX of the Convention....is a provision of a Convention whereby the United Kingdom assumes an obligation of the kind provided for in Article 59 of the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Brussels on 27th September 1968.

Article XII of the convention provides that Canada "shall designate the provinces or territories to which [the] Convention shall extend", but it would appear that this provision only concerns the enforcement

of Canadian judgments in the United Kingdom and vice versa. So the United Kingdom, in other words, will refuse to recognise and enforce certain judgments of courts of other EC states given against persons domiciled or habitually resident in any part of Canada.¹⁷¹

The "article 59" convention with Australia, which is termed an agreement rather than a convention, was signed on 23 August 1990 but is not yet in force.¹⁷² Like the convention with Canada, the agreement with Australia is primarily concerned with the reciprocal recognition and enforcement of judgments. Article 3 contains provisions virtually identical to those of art IX of the convention with Canada, but there appears in addition as para (2)(c) of art 3:

in the case of an individual who -
(i) is resident in Australia; and
(ii) has been so resident for the last three months or more,
the requirements of Article 3(2)(a) shall be presumed to be fulfilled unless the contrary is proved.

This presumption is along the same lines as the presumption in s 41 of the Act. The effect of subsections (2) and (6) of s 41 is of course that an individual who is, and has been for the last three months, resident in the United Kingdom is to be presumed to be domiciled in the United Kingdom.

Lengthy negotiations for an "article 59" convention took place between the United Kingdom and the United States in the 1970s. The United States, frightened of the possibility of pursuers domiciled in France taking advantage of art 4 para two of the Brussels Convention and art 14 of the French Code civil, referred to in Chapter 2, and obtaining judgments which could be enforced in other EC states, was anxious in particular to conclude an "article 59" convention with the

United Kingdom. A draft convention was produced, but the negotiations then broke down and fresh negotiations have not yet been instituted. What was being considered was in fact an ambitious convention covering enforcement as well as the refusal of enforcement. But there was much opposition in the United Kingdom to the possibility of its courts being required to enforce huge awards of damages made by American juries, and this seemed to prove an insurmountable stumbling block for the negotiations as a whole.¹⁷³

Very few "article 59" conventions appear to have been concluded by EC states. A convention between Germany and Norway was signed on 17 June 1977; art 23 is of relevance. Each state agreed not to enforce a judgment given by a court of a third state if it was given against a person domiciled or habitually resident in the other state and jurisdiction was based on one of six listed grounds.¹⁷⁴ Of course on account of the reference to art 3 para two in art 59, Germany can only refuse, in terms of the Brussels Convention, to enforce a judgment of a court in another EC state given against a person domiciled or habitually resident in Norway if the relevant ground of jurisdiction is one of those set out in art 3 para two as well as being listed in the convention between it (Germany) and Norway. The five Nordic states - Denmark, Finland, Iceland, Norway and Sweden - signed a convention on 11 October 1977. In this convention, which is not in force with regard to Iceland, art 2 is of most relevance; it appears closely to follow the terms of art 59.¹⁷⁵ But these two conventions will be superseded by the Lugano Convention.

It is submitted that it may very well be that on account of the political and economic developments in the EC, EFTA and Eastern

Europe, and also on account of the entry into force of the Lugano Convention, further interest will be shown by third states in the possibility of entering into "article 59" conventions with certain states in the EC / EFTA bloc. The United States in particular might feel that the time was right to recommence negotiations. There is of course also the possibility of states outside the EC / EFTA bloc becoming parties to the Lugano Convention itself; the Lugano Convention, unlike the Brussels Convention, is not a "closed" convention. At the present time the question of whether various states in Europe outside the EC / EFTA bloc are more likely to enter into "article 59" conventions with major states in the bloc, or to become parties to the Lugano Convention itself, must remain an open one.

In concluding this chapter it will simply be reiterated that one result of the straightforward system of recognition and enforcement of judgments contained in the Conventions is that, as a general rule, at the stage of enforcement of a judgment against a domiciliary of a third state, account cannot be taken of his domicile or of the possibly exorbitant nature of the national rule of jurisdiction which enabled proceedings to be brought against him. But there is an as yet little used power given to contracting states to agree with third states in certain limited circumstances not to recognise and enforce judgments given in other contracting states against domiciliaries of the third states concerned.

5 Intra - EC / EFTA bloc and intra-UK actions: particular problems

(a) Intra - EC / EFTA bloc actions

The first of the two related questions which are the subject of this section is whether, in proceedings within the subject matter scope of the Conventions, a United Kingdom court may apply the doctrine of forum non conveniens and decline jurisdiction (or simply stay / sist the proceedings) in favour of a court of another state in the EC / EFTA bloc. The doctrine of forum non conveniens was summarised in Chapter 1, and in Chapter 3 the comments of Schlosser, Droz and other writers on the doctrine were set out. It is submitted that the possibility of the European Court sanctioning the staying / sisting or dismissing of an action by a United Kingdom court in favour of a court of another contracting state is virtually non-existent.

The doctrine of forum non conveniens is of course, at any rate as a general rule, unknown to the Continental contracting states, and it is rare to find a Continental writer favourably disposed towards it. Near the beginning of his note on the decisions in Arkwright and Berisford, Collins indicates that it may be appropriate to make a distinction between actions in which the alternative forum is in another contracting state and actions in which it is in a third state:

Where the Brussels Convention applies and where the jurisdictional question is in which Contracting State the case should proceed, it is generally accepted that forum conveniens principles play no part.¹⁷⁶

Schlosser is of course clearly unenthusiastic about forum non conveniens as a whole. While his stance with regard to declining jurisdiction in favour of courts of third states cannot be said to be

totally free from doubt, it is obvious that he is opposed to forum non conveniens within the EC or the EC / EFTA bloc. His reference to plaintiffs having deliberately been given a right of choice makes this clear.¹⁷⁷ Droz's hostility to forum non conveniens has been clear and consistent since 1972.¹⁷⁸ There is unanimity, or near unanimity, among the British writers that, however unfortunate this may be felt to be, the Court of Session could not, for example, decline jurisdiction on the grounds of forum non conveniens in favour of a court in France or Finland, Spain or Sweden.

On the Continent a lone dissenting voice may be that of Verheul, who¹⁷⁹ stated that

the question whether forum non conveniens is consistent with the Convention, and if so, to what extent is still open....[W]hen in a specific case justice demands an ad hoc deviation from the general rules because of particular circumstances, it is and remains the task of the judge to do justice.

The present writer has read nothing elsewhere which leads him to believe that Verheul's approach is shared by other Continental writers. It is submitted that the European Court might, in order to do justice, be prepared effectively to introduce into the provisions of the Brussels Convention one or two specific exceptions of relevance in the intra-EC context. It was of course submitted in Chapter 3 that it might very well be prepared effectively to introduce certain exceptions in the context of actions concerning third states. But on account of the perceived importance of certainty, the other arguments put forward by Schlosser and the general lack of a forum non conveniens doctrine on the Continent, the Court would not be prepared to give United Kingdom and Irish courts

carte blanche to decline jurisdiction in the intra-EC context on the basis of forum non conveniens.

The second question to be considered in this section is this. At common law a Scottish court has of course been able to decline jurisdiction on the basis of forum non conveniens in favour of an English court. And an English court could do so in favour of a Scottish court. In the preceding paragraph it was submitted that a United Kingdom court can no longer, in proceedings within the subject matter scope of the Conventions, decline jurisdiction in favour of a court of another state in the EC / EFTA bloc. Can it still do so in favour of a court in another of the United Kingdom's law districts? Would the European Court consider it acceptable for a French or German pursuer to be told by the Court of Session that he should go and bring his action against a United Kingdom domiciliary in the English High Court instead?

The question cannot, it is submitted, be answered with any certainty. On the one hand it can be said that art 2 of the Conventions simply allocates jurisdiction in proceedings against the United Kingdom domiciliary to the United Kingdom courts in general; it leaves it to English and Scots law to determine the particular courts with jurisdiction. So long as the second United Kingdom court involved does not also decline jurisdiction, there is compliance with art 2. But on the other hand it can of course be pointed out that Schlosser believes that a pursuer should not be required to waste his time and money through effectively being sent from one court to another. Going from one court to another within a contracting state may be no less wasteful of time and money than going from a court in one contracting

state to a court in another. The envisaged state of affairs could not arise if the Frenchman brought an action in a German court against a German domiciliary or in an Italian court against an Italian domiciliary. Is a court composed largely of Continental lawyers likely to be happy about the prospect of the first court seised declining jurisdiction - or even staying / sisting the proceedings - when an action is brought in the United Kingdom against a United Kingdom domiciliary?

If the defender is domiciled in the United Kingdom, the United Kingdom courts in general certainly appear to have jurisdiction in terms of art 2 of the Conventions irrespective of the domicile of the pursuer. But it may be that, on account of the perceived role of the Conventions in strengthening the "legal protection" of persons in the EC / EFTA bloc, the European Court would be less sympathetic to a pursuer domiciled in a third state than to a pursuer domiciled in another EC state or in an EFTA state.

(b) Intra-UK actions

The question to be considered in this section is whether actions which are purely internal to the United Kingdom or any other contracting state are outside the scope of the Conventions as a whole. If such actions are outside the scope of the Conventions as a whole, the question then arises of what the circumstances are in which an action is internal. Or, putting it another way, what are the factors which make an action international rather than internal? It should be said that it is assumed by very many practitioners that if an action is totally "British", the Conventions are irrelevant and can be ignored; consideration need only be given to Scheds 4 and 8 to

the Act. Is this correct? If so, what do we mean here by "British"?

The problem, it should be said, only arises in connection with the jurisdiction provisions in Title II of the Conventions. For Title III is concerned with the recognition and enforcement in one contracting state of a judgment given in another; this is made clear by arts 26¹⁸⁰ and 31. The Title has no application in questions of recognition and enforcement which are internal to one state. In considerations of the effect or lack of it of Title II in questions of jurisdiction which are internal to one state, the starting point is usually the preambles of the Conventions. The preamble of the Brussels Convention states that the parties to the Treaty of Rome decided to conclude the Convention

Anxious to strengthen in the Community the legal protection of persons therein established;

Considering that it is necessary for this purpose to determine the international jurisdiction of their courts....

In the Lugano Convention, the preamble states that the parties to the Convention decided to conclude it

Anxious to strengthen in their territories the legal protection of persons therein established,

Considering that it is necessary for this purpose to determine the international jurisdiction of their courts....

Reference is generally then made to the Jenard and Schlosser Reports.

¹⁸¹
According to Jenard, the Brussels Convention

governs international legal relationships....As is stressed in the fourth paragraph of the preamble, the Convention determines the international jurisdiction of the courts of the Contracting States.

It alters the rules of jurisdiction in force in each Contracting

State only where an international element is involved. It does not define this concept, since the international element in a legal relationship may depend on the particular facts of the proceedings of which the court is seised. Proceedings instituted in the courts of a Contracting State which involves [sic] only persons domiciled in that State will not normally be affected by the Convention; Article 2 simply refers matters back to the rules of jurisdiction in force in that State. It is possible, however, that an international element may be involved in proceedings of this type. This would be the case, for example, where the defendant was a foreign national, a situation in which the principle of equality of treatment laid down in the second paragraph of Article 2 would apply, or where the proceedings related to a matter over which the courts of another State had exclusive jurisdiction (Article 16), or where identical or related proceedings had been brought in the courts of another State (Articles 21 to 23).

182

And then Schlosser states that

[a]s already discussed in the Jenard report, the provisions governing the scope of the 1968 Convention contain four significant elements....They are:

1. Limitation to proceedings and judgments on matters involving international legal relationships.

The accession of the new Member States to the 1968 Convention in no way affects the application of the principle that only proceedings and judgments about matters involving international legal relationships are affected....

It is appropriate at this point to ask: What is the practical significance of the discussion concerning the question of whether proceedings internal to one contracting state are outside the scope of Title II as a whole? If one considers the various provisions of Title II, one sees that the practical effect is small. For most of the provisions are concerned with situations where there is an international element. Title II contains arts 2 - 24. It seems useful to consider the various articles in reverse order. The effect of art 24 is that the local rules are always applicable in the event of an urgent matter arising and an interim award being sought; this article does not therefore cause any difficulty in the present context.

Articles 21 and 22, and arguably art 23 too, are concerned with the situation where there are identical or related actions taking place in different contracting states; they cannot in any event be applicable in purely internal disputes. Articles 19 and 20 do not set out rules of jurisdiction; instead, they lay down the duty of the court in actions also involving another contracting state. Articles 17 and 18, concerning prorogation of jurisdiction, will be considered below.

Article 16 concerns exclusive jurisdiction. On account of the approach of art 16, allocating jurisdiction to the courts of a particular state, if a defender is invoking art 16 it is because there is - at any rate in his submission - an international element in the dispute. Section 4, containing arts 13 - 15, concerns consumer contract matters; Section 3, containing arts 7 - 12A, concerns insurance matters. These sections will be referred to again below. Articles 6 and 6A contain little-used rules of special jurisdiction. Article 5 begins: "A person domiciled in a Contracting State may, in another Contracting State, be sued:"; it can therefore only be applicable in proceedings with an international element. Finally, there are arts 2 - 4. These contain the general rules that a defender should be sued in the courts of the contracting state in which he is domiciled (art 2), a defender should only be sued in the courts of another contracting state if this is permitted by the Conventions (art 3), and a defender not domiciled in any of the contracting states may be sued in any state in which this is permitted by the national rules of jurisdiction (art 4). Article 4, like art 24, does not contain a prohibitory rule, and art 3 is clearly only of

relevance where there is an international element.

On account of the existence of rules of jurisdiction in Schedules 4 and 8 of the Act generally parallel to those of art 2 and of Sections 3 and 4, in the United Kingdom there is not likely to be a conflict involving art 2, Section 3 or Section 4 of the Conventions on the one hand and national rules on the other, a conflict which can only be resolved by determining whether the Conventions are applicable in purely internal actions. There are, however, two contexts in which the problem is much more likely to arise in practice. The first concerns certain of the provisions of prorogation of jurisdiction, and the second concerns the doctrine of forum non conveniens.

The rule of prorogation by appearance, to be found in art 18, has counterparts in Schedules 4 and 8 and, as a result, is highly unlikely to cause any practical problems in the present context. But in art 17 it is provided that

[i]f the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction.

The remaining provisions of art 17 contain qualifications to this principle and also rules of formal validity. The question arising from art 17 in the present context is clearly this: If the two parties are domiciled in the same contracting state, and the action has no connection with any other state, is it the case that - assuming the agreement to be formally valid - the chosen court(s) has / have exclusive jurisdiction in terms of the Conventions? If the Conventions as a whole are applicable to the matter, then on account

of the wording of art 17 the chosen court(s) would indeed seem to have exclusive jurisdiction. But if the Conventions as a whole are not applicable to the matter, art 17 clearly cannot be applicable and the matter must be determined by the local law alone.

It is important to note that in the United Kingdom context the question is not devoid of practical significance. For in Sched 4, art 17 begins:

If the parties....have agreed that a court or the courts of a part of the United Kingdom are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationshipthat court or those courts shall have....jurisdiction....

The matter has not yet been the subject of a decision by a superior court,¹⁸³ but it may very well be the case that whereas the jurisdiction conferred by art 17 of the Conventions is exclusive, that conferred by art 17 of Sched 4 is - assuming the Conventions not to be applicable - non-exclusive. But of course s 16(4) of the Act provides that Sched 4 is to be read subject to the Conventions. So it might very well be that if there is an internal action in the United Kingdom, and the Conventions as a whole are not applicable to internal actions, the jurisdiction conferred by the prorogation agreement is not exclusive. But if the Conventions as a whole are applicable in internal as well as international actions, in that case the jurisdiction is exclusive.

It is interesting that this question has in a sense been anticipated by Jenard and Schlosser. It may well be that in certain of the original contracting states the domestic rules of prorogation are different from those in art 17 of the Conventions. Jenard states that¹⁸⁴

art 17 para one

does not apply where two parties who are domiciled in the same Contracting State have agreed that a court of that State shall have jurisdiction, since the Convention, under the general principle laid down in the preamble, determines only the international jurisdiction of courts.

185

Schlosser begins his discussion of art 17 with the words "Article 17, applying as it does only if the transaction in question is international in character...." Both Jenard and Schlosser are clearly aware that the question of the application of Title II of the Conventions in internal actions is a "live issue" in the context of art 17. In fact, until the United Kingdom and Ireland joined the original contracting states in 1987 it was probably only in the context of art 17 that the problem was at all likely to arise in practice. On account of the way in which the rules of jurisdiction of the Conventions have generally been framed, and the similarity between the rules of jurisdiction of the Conventions and the rules of national legal systems, there were few if any other contexts in which the problem was likely to arise.

But there is now also the interesting question of whether, in actions totally internal to the United Kingdom, the powers of the courts to decline jurisdiction on the basis of forum non conveniens in favour of a court of another United Kingdom law district have been restricted. If the Conventions do not apply to internal actions, the courts' powers have clearly not been reduced. But if they do apply to internal as well as international actions, their powers may have been reduced. For it can of course be argued that the United Kingdom courts have jurisdiction in such actions on account of art 2 of the Conventions, and that when the Conventions leave it to contracting

states to determine the particular courts with jurisdiction, it expects these courts to exercise that jurisdiction. This point has already been made in the context of the declining of jurisdiction on the basis of forum non conveniens in favour of a court in another United Kingdom law district in proceedings against a United Kingdom domiciliary brought by a domiciliary of another state in the EC / EFTA bloc or of a third state.¹⁸⁶

All those who wish to have the scope of the doctrine of forum non conveniens reduced as little as possible would undoubtedly wish to see the European Court give a ruling concerning the non-applicability of the Brussels Convention in internal actions along the same lines as the passages in the Jenard and Schlosser Reports quoted above. It is interesting to note that Cheshire and North assert that¹⁸⁷

the preamble indicates that the Convention is only concerned with the international jurisdiction of Contracting States. It follows that it will not apply where a dispute involves no foreign element or where the foreign element only involves another part of the United Kingdom.

This short passage is of course in line with the first passages of the Jenard and Schlosser Reports quoted above. And the view which is expressed in it will have been welcomed by, among others, the practitioners who wish to be able with justification to ignore the Conventions when they are considering the question of jurisdiction in the vast majority of their actions. For of course there is always the possibility that there may exist "conflicts" between the Conventions on the one hand, and Schedules 4 and 8 on the other, other than those outlined above concerning art 17 para one of the Conventions and the doctrine of forum non conveniens. But is the thinking of leading Continental writers other than Jenard and Schlosser to the same

effect as that of Cheshire and North? And, if so, in what circumstances do they consider an action to be purely internal to one contracting state?

¹⁸⁸
Weser asks: "La convention ne s'applique-t-elle que dans l'ordre international?" She begins by referring to the preamble, and then asks: "Que signifient les termes 'la compétence de leurs juridictions dans l'ordre international'?" Her answer is this:

Au premier abord, l'on pourrait croire que ces termes ont une signification importante et que le juge saisi d'un litige devrait, chaque fois avant de se déclarer compétent en vertu de la Convention, examiner la question de savoir s'il s'agit ou non d'une compétence "dans l'ordre international".

En fait, en raison de la construction même de la Convention, cette distinction n'a pratiquement que très peu d'importance.¹⁸⁹

She refers to various articles of the Convention, and then asks:

Un litige entre un demandeur belge et un défendeur belge domicilié en Belgique et porté devant les tribunaux belges, serait-il régi par la Convention?¹⁹⁰

Her answer is that

[l]a question n'a qu'un intérêt purement théorique.

En effet, d'après l'article 2 de la Convention, dès qu'un défendeur est domicilié dans l'Etat dont les tribunaux sont saisis, sont applicables les règles de compétence de l'Etat du for, c'est-à-dire, dans notre exemple, les règles de compétence prévues par le Code judiciaire belge.

Quelle différence y a-t-il en pratique si, lorsque le défendeur est domicilié en Belgique, le juge belge applique dans un procès entre deux Belges, les règles de compétence prévues au Code judiciaire par l'application de son droit national ou en vertu de la Convention C.E.E. qui renvoie expressément à ce droit national?¹⁹¹

Weser was of course writing well before the United Kingdom, a state with three law districts and a doctrine of forum non conveniens,

became a party to the Convention. On account of these passages, it might very well be thought that Weser considers that in principle each action is either internal or international, but that in practice the distinction has very little significance. But then she continues:

Le concept de base de la Convention est le domicile du défendeur....

C'est un progrès important que l'on ne doit pas diminuer en raison des termes employés par le préambule de la Convention.

L'ingéniosité de la structure de la Convention est précisément d'y faire rentrer, lors du procès d'origine, pratiquement tous les procès portés devant les tribunaux des Etats contractants ce qui a permis, en contrepartie, de faciliter notablement la reconnaissance et l'exécution des décisions ainsi rendus dans les autres Etats de la Communauté.¹⁹²

It is submitted that what she is arguing here is that, loosely speaking, the articles of the Convention take priority over the words of the preamble. The Convention is so structured that it applies to practically all civil actions in courts of contracting states which come within its subject matter scope. Title III is concerned with the recognition and enforcement in one contracting state of any judgment given in any other; Title II is therefore concerned with jurisdiction in any proceedings which might lead to the giving of a judgment enforceable in the other contracting states. The civil actions which she states might be outside the scope of the Convention as a whole are those where there is exclusive jurisdiction. Presumably she has in mind art 16; on account of its subject matter a judgment given in proceedings in which jurisdiction was based on art 16 will almost certainly be enforced in the state in which it was given. But her conclusion is in fact that "les compétences exclusives sont devenues des compétences exclusives communautaires; tous les litiges....sont donc régis par la Convention". Weser then concludes her section on

the Convention and internal actions by stating:

En fait, l'application de la Convention dans "l'ordre international" n'aurait - et encore - d'intérêt qu'en matière de prorogation de juridiction.

Cette précision nous paraît importante parce qu'elle évitera, aussi bien aux parties qu'au juge, de se poser la question si le litige se meut ou non dans l'ordre international.¹⁹⁴

It is submitted that the first of these sentences is unexceptional, but the second somewhat clouds the picture. For two or three paragraphs earlier she appeared to be asserting that no actions are outside the scope of the Convention and yet here she is stating that those involved in litigation can in practice almost always avoid the question of whether an action is international. If she considers the question to be in principle irrelevant, why does she not specifically say so here? Some light is shed on this matter in the section by Jenard and Weser on civil jurisdiction in Van der Elst and Weser's¹⁹⁵ textbook on international private law published in 1985; the relevant section of the chapter can perhaps more usefully be considered below in the particular context of prorogation agreements.

It seems appropriate to mention at this point an argument in favour of an internal action / international action distinction which is based on general principles of Community law. For, after all, a national court required to decide whether the Convention is in principle applicable in the context of a prorogation problem or a forum non conveniens problem in a purely internal action might be heavily influenced by the words of the Jenard and Schlosser Reports. But on the other hand the European Court would seek to give a judgment which was in accordance with Community law as a whole. It

would be very conscious of art 220 of the Treaty of Rome linking the Convention to the Community treaties and other instruments.

Part Two of the Treaty of Rome is headed "Foundations of the Community". Its four Titles are concerned with "Free movement of goods" (Title I), "Agriculture" (Title II), "The free movement of persons, services and capital" (Title III) and "Transport" (Title IV). Title III is divided into chapters on "Workers", "Right of establishment", "Services" and "Capital". The full implementation of these provisions is essential for the completion of the internal market within the EC. The Brussels Convention can be seen as providing a further freedom - the free movement of judgments - a freedom which is required to complement the freedoms enshrined in Part Two of the Treaty of Rome.

Article 48 of the Treaty of Rome, to be found in Chapter 1 of Title III of Part Two, states that "[f]reedom of movement for workers shall be secured within the Community...." It goes on to explain what is meant by "freedom of movement". ¹⁹⁶ R v Saunders concerned a requirement imposed on a British citizen by an English criminal court that during a three-year period she remain in Northern Ireland, or at any rate not set foot in England and Wales. After the question of whether this requirement was contrary to art 48 was referred to the European ¹⁹⁷ Court, it was held that

[t]he provisions of the Treaty on freedom of movement for workers cannot....be applied to situations which are wholly internal to a member-State, in other words, where there is no factor connecting them to any of the situations envisaged by Community law. [This] is a wholly domestic situation which falls outside the scope of the rules contained in the Treaty on freedom of movement for workers.

Article 48 was also considered in Moser v Land Baden-Württemberg; ¹⁹⁸

reference was made here to R v Saunders. On account of his membership of a particular political party, Moser, a German, was refused permission to undertake teacher-training in Baden-Württemberg. It would therefore be difficult for him to teach in a school in another EC state. The European Court was asked whether, as a result, there was a contravention of art 48. It was held that¹⁹⁹

Article 48 of the EEC Treaty does not apply to situations which are wholly internal to a member-State, such as the situation of a national of a member-State who has never resided or worked in another member-State. Such a national may not rely on Article 48 to contest the application to him of the legislation of his own country.

Bekaert v Procureur de la République, Rennes,²⁰⁰ concerned art 52. This article, to be found at the beginning of Chapter 2 in Title III, states that

restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished....Such progressive abolition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Bekaert, a Frenchman, argued that French regulations effectively restricting his extending his business were contrary to art 52 and certain related EEC regulations. Not surprisingly, it was held that²⁰¹

the present case involves a situation which is purely internal in one member-State....Article 52....prohibits, as a restriction on freedom of establishment, any discrimination on grounds of nationality.

Therefore, if a particular case contains no element which goes beyond a purely national framework, this has the effect that, so far as the freedom of establishment is concerned, the provisions of Community law do not apply to such a situation.

Therefore....neither Article 52 nor [the related regulations]....apply to situations which are purely internal to a member-State, such as the situation of a national of a member-State who has never resided or worked in another member-State.

So a strong case, based on the preamble to the Convention, certain short passages in the Jenard and Schlosser Reports, the general approach of Community law to matters internal to one contracting state and these three decisions can therefore be made for the separation of actions, for the purposes of the Brussels Convention, into internal ones and international ones, with only international ones within the scope of the Convention. On the other side, of course, there appears to be the approach of Weser. As has been said, if a distinction can be made, it may very well only be of practical importance in the context of art 17 and of forum non conveniens. It is therefore appropriate to consider the dicta of the leading writers on the internal / international distinction in the context of art 17 and of forum non conveniens. Of course more has been written in the art 17 context; until 1 January 1987 the effect of the Convention on forum non conveniens was theoretical.

202

Writing in his Report about art 17, Jenard states that the article applies

where the agreement conferring jurisdiction was made either between a person domiciled in one Contracting State and a person domiciled in another Contracting State, or between a person domiciled in a Contracting State and a person domiciled outside the Community, if the agreement confers jurisdiction on the courts of a Contracting State; it also applies where two persons domiciled in one Contracting State agree that a particular court of another Contracting State shall have jurisdiction.²⁰³

According to Schlosser,

the mere fact of choosing a court in a particular State is by no means sufficient to establish [that the matter is international].²⁰⁴

There certainly appears to be a difference of opinion here. But if

one turns to the joint work by Jenard and Weser on civil
jurisdiction, one finds Jenard asserting that²⁰⁵

si un litige ne met en cause que des personnes domiciliées dans un même pays, la seule désignation d'un tribunal étranger ne peut revêtir l'élément d'extranéité permettant de déroger aux règles impératives ou exclusives de compétence en vigueur dans ce pays.

In other words, if two parties domiciled in the same contracting state prorogate the jurisdiction of a court of another state, this does not have the effect of making the ensuing action international and therefore within the scope of the Convention. Why Jenard has changed his mind on this point - if indeed he has - is not clear. It should be noted at this point that in the joint work the two authors separately set out their views on the significance of the words "international jurisdiction" in the preamble to the Convention. They²⁰⁶ state that they "ont des avis légèrement différents en ce qui concerne l'importance et l'interprétation du préambule". What these slight differences are cannot unfortunately be identified with certainty. Weser repeats,²⁰⁷ virtually word for word, the case which she made in her 1973 article. Jenard, on the other hand, quotes²⁰⁸ from his own Report and then, immediately before the last sentence set out above, states:

Les règles de compétence impératives et exclusives prévues par la loi d'un Etat continuent....à s'appliquer si le litige se situe dans l'ordre interne de cet Etat, ces règles de compétence étant généralement justifiées par des considérations d'ordre social.²⁰⁹

While the whole matter is far from free from doubt, it would not appear to be unreasonable to state that one can find much more support for the notion of a distinction between internal actions and international ones in the work of Jenard than one can in the work of

Weser. So far as art 17 is concerned, Droz's position appears to be that where the two parties to the prorogation agreement are domiciled in the same contracting state, the Convention is nevertheless in principle applicable either if the chosen court is situated in another state or if the subject matter of the action is or was situated in another state. He asserts that

210

[l']énumération [de Jenard] est juste, mais incomplète....[S]i deux parties domiciliées dans un Etat contractant élisent un tribunal de cet Etat....le caractère international....peut résulter du litige lui-même.

211

Later on he states that

si pour l'application de la Convention la clause d'élection de for doit présenter un caractère international, ce caractère provient, dans l'hypothèse étudiée, du seul choix d'un tribunal étranger.

If there is some doubt about what makes an action international in the context of art 17, there is much more doubt in the context of the doctrine of forum non conveniens. The recent entry into force of the Convention in the United Kingdom, the hostility of Continental writers to the doctrine and the reluctance on the part of British writers to see a cherished tradition eroded have no doubt all contributed to the lack of serious discussion of this issue. One might make reference to the sentence in Droz's Pratique that

212

[o]n peut estimer que la Convention s'applique dès que le litige, par son objet, le domicile ou la volonté des parties, pourrait mettre en jeu la compétence des tribunaux de deux ou plusieurs Etats dont l'un au moins serait un Etat contractant.

But of course this was written well before the entry into force of the Convention in the United Kingdom. It is submitted that this sentence should not be considered as any more than a useful

generalisation for practitioners and students - particularly as it immediately follows the statement that the reference to international jurisdiction in the preamble "n'a en pratique d'intérêt qu'en ce qui concerne les accords d'élection de for".

So there is much room for doubt about the whole matter of whether a distinction between internal actions and international actions should be made and, if so, just where the line should be drawn. The writers, one feels, have not always made themselves as clear as they might have done. And Jenard's appearing to change his own mind on one point does not make things any easier. The weight of authority certainly favours the making of an internal / international distinction, but until the European Court rules on whether such a distinction should be made, and if so where it should be made, both at the stage of the drawing up of prorogation agreements and at the stage of the beginning of litigation practitioners must take care in advising clients on questions of civil jurisdiction where the "European" rule may be different from the national or local one. Beyond advising in each case a reading of Schedules 1, 4 and 8 to the Act together with caution, it may not be possible usefully to suggest a general approach to Scottish practitioners; they must look at each case individually. It is very much to be hoped that the European Court will soon have the opportunity to give a ruling on a problem which, although in principle central to Title II of the Convention, has - despite the arrival of the United Kingdom on 1 January 1987 - managed to remain dormant since 1 February 1973.

To conclude this section, it is suggested that a distinction between internal actions and international ones should be made, and that the

principal connecting factor used in the making of the distinction should be domicile. At this stage in the development of the European Community matters purely internal to any one member state are, at least as a general rule, to be resolved by the legislature, executive and judiciary of that state alone. There is no good reason for an exception to be made in the context of civil jurisdiction. The existence of the doctrine of forum non conveniens in the internal United Kingdom context, for example, is not harming the operation or even the development of the Community as at present constituted. But if the political nature of the Community is to change, with decision-making becoming more centralised, then there might very well be a much stronger case for the scope of the Convention extending to actions unconnected with more than one member state.

It is submitted that on account of the policy considerations involved, Title II of the Convention should apply to any action within the subject matter scope of art 16. But outside the art 16 context an action should be considered international - in other words within the scope of the Convention - if both parties are not domiciled in the same contracting state. Two points should be made in justification of this assertion. The first is that parties have an interest in the initiation and the outcome of litigation; places and courts do not. So the fact that the events which caused the action to be brought took place in another state should not be considered to make the action international. Nor should the existence of a prorogation agreement in favour of a court of another state; it should be left to the law of the state in which the action is brought to determine whether effect is to be given to the agreement.

The second point concerns the use of the connecting factor of domicile. It is hardly necessary for justification to be given for the proposition that if the defender is not domiciled in the state in which the action is brought, the action should be considered international. It is a trite point that the Convention is concerned with the circumstances in which a natural or legal person can be sued in a state in which he or it is not domiciled. So far as the pursuer is concerned, the argument here is that the Convention was designed "to strengthen in the Community the legal protection of persons therein established"¹¹³. "[E]stablished" can be interpreted as "domiciled". Pursuers, as well as defenders, are entitled to protection; a pursuer domiciled in one contracting state wishing to sue an individual domiciled in another contracting state should be entitled to rely on the provisions of the Convention such as art 2. A pursuer domiciled in a third state, but not in any contracting state, it might be said, is not entitled to this protection. But it is submitted that it would not be appropriate to have a rule which allowed a French domiciliary to sue a United Kingdom domiciliary in the United Kingdom on account of art 2, but did not allow an American domiciliary to do so. Such an approach would be politically and diplomatically inexpedient and would be liable to have a detrimental effect on trade between EC states and third states.

It should finally be said that, on account of art 2 para two of the Convention, there is an argument that it ought to be held by the European Court that an action falls within the international category if the pursuer - or possibly if either party - is not a citizen of the state in which the parties are domiciled and the action is

brought. But the practical significance of art 2 para two is at most very small, and whether such a ruling ought to be made by the European Court is a matter which could only be settled after consideration of the current national rules of jurisdiction in each of the Continental contracting states.

6 The remitting and transferring of actions

For some time now certain statutory provisions have enabled a sheriff, in particular circumstances, to remit an action to the Court of Session or to transfer an action to another sheriff court. And a recent statutory provision enables a Court of Session judge to remit an action to a sheriff court. The purpose of this chapter is to consider the extent to which the discretionary power to remit or transfer an action in terms of one of the statutory provisions may have been restricted by the Conventions or the Act itself.

Section 37(1) of the Sheriff Courts (Scotland) Act 1971, as amended by section 16(a) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, states:

In the case of any ordinary cause brought in the sheriff court the sheriff...(b) may...on the motion of any of the parties to the cause, if he is of the opinion that the importance or difficulty of the cause make it appropriate to do so, remit the cause to the Court of Session.

Provisions for the transfer of actions from one sheriff court to another are set out in Rule 19 of the Ordinary Cause Rules and in Rule 22 of the Summary Cause Rules. It is now provided by Rule 2(2) and Appendix 3 of the Small Claim Rules that Rule 22 of the Summary Cause Rules is applicable to small claims.

Rule 19(1)(d) of the Ordinary Cause Rules states: "The sheriff may upon sufficient cause remit any cause to another sheriff court". Paragraph (a) of Rule 19(1) states that, where there are two or more defenders and an action has been raised in the sheriff court of the residence or place of business of one of them, the action may be transferred by the sheriff to any other sheriff court which has

jurisdiction over any of the defenders. But para (c) states that such a transfer shall not be made unless the sheriff "considers it expedient to do so having regard to the convenience of the parties and their witnesses". In other words, a para (a) transfer should not be made as a matter of course whenever it is sought. It may be doubted in fact if there is any situation in which a transfer could be made by virtue of para (a) but not by virtue of para (d).

It is generally considered that the transfer may be made to another sheriff court in the sheriffdom or to a sheriff court in a different sheriffdom. Another point is that although a s 37(1) remit may only be made "on the motion of any of the parties", the sheriff may transfer a cause in terms of rule 19 either on the motion of one of the parties or ex proprio motu.

It should be remarked in passing that it seems unfortunate that the reference in Rule 19(1)(a) to the court of the "residence or place of business" of a defender has not been amended. In actions falling within the subject matter scope of Sched 8 to the Act, jurisdiction cannot of course be based on the defender being resident in, or having a place of business in, the sheriff court district. The number of actions in which jurisdiction is still determined by s 6 of the Sheriff Courts (Scotland) Act 1907, rather than by Sched 8 to the Civil Jurisdiction and Judgments Act 1982, is extremely small.

So far as summary causes are concerned, Rule 22 states:

A cause may be transferred to any other court, whether in the same sheriffdom or not, if the sheriff considers that it is expedient that this be done.

It seems that the sheriff court to which a transfer is made in terms of Rule 19 or Rule 22 need not be a court which otherwise has jurisdiction in the action. Rule 20 of the old Ordinary Cause Rules began: "The sheriff may upon sufficient cause, by interlocutor stating his reasons, remit any cause to another sheriffdom", and Dobie stated that²¹⁴

this rule appears to authorize a transfer on grounds of expediency to another Court irrespective of the question whether or not it has jurisdiction over the defenders or any of them, and it is understood to be so acted on in practice".

It should be mentioned that s 37(1) of the 1971 Act refers to ordinary causes. Can a summary cause be remitted to the Court of Session? An argument that it can might be based on Rule 22 of the Summary Cause Rules, but it is submitted that the better interpretation of the words "any other court" in Rule 22 is "any other sheriff court"²¹⁵. This interpretation is supported by the words "whether in the same sheriffdom or not" and by the lack of any reference to the Court of Session.

Certain specialised provisions relating to the transfer of particular types of actions are outside the scope of this thesis.²¹⁶

The provision enabling actions to be remitted by the Court of Session to a sheriff court is to be found in s 14 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. It states:

The Court of Session may in relation to an action before it which could competently have been brought before a sheriff remit the action (at its own instance or on the application of any of the parties to the action) to the sheriff within whose jurisdiction the action could have been brought, where, in the opinion of the Court, the nature of the action makes it appropriate to do so.

If there are already related proceedings in a sheriff court, this will clearly be a factor in the determining of whether a remit by the Court of Session would be appropriate.²¹⁷ Case law is in fact building up on the circumstances in which a remit or transfer should take place. But this case law is not relevant to the subject of the Conventions and Act and the remitting and transferring of actions.²¹⁸

Not surprisingly, the Conventions make no reference to the Scottish rules concerning the remitting and transferring of actions. Nor do any of their provisions refer to the subject in a "European", as opposed to Scottish, context. But the powers of the courts of Scotland and of the other law districts of the British Isles to remit or transfer an action to another court in the same law district are considered in the Schlosser Report. Schlosser states that²¹⁹

[t]he previous legal position in Ireland and the United Kingdom remains essentially the same. Each court can transfer proceedings to another court, if that court has equivalent jurisdiction and can better deal with the matter.

One of his examples is that

a Sheriff Court in Scotland...may transfer proceedings to another court of the same category or exceptionally to a court of another category, if the location of the evidence or the circumstances for a fair hearing should make such a course desirable in the interest of the parties.²²⁰

So it would appear to be Schlosser's view that, as a general rule, in the case of actions within the subject matter scope of the Conventions, the Scottish courts are still free to make remits and transfers in the circumstances provided for in the statutory provisions set out at the beginning of this chapter. But if one reads further it becomes apparent that Schlosser regards the general rule

as having an exception. If the defender is domiciled in another contracting state and the pursuer is making use of a rule of special jurisdiction, it will only be in highly unusual circumstances that a remit or transfer can be made. For the court's

discretionary powers should, of course, only be used in the spirit of the 1968 Convention, if the latter has determined, not only international but also local jurisdiction.²²¹

In the context of the art 5 special jurisdiction rules (which, of course, determine local jurisdiction), Schlosser states that²²²

a transfer to another court of the same State must be permitted, when proper proceedings are not possible before the court which would otherwise have jurisdiction.

But on the other hand a

transfer merely on account of the cost of the proceedings or in order to facilitate the taking of evidence would be possible only with the consent of the [pursuer], who had the choice of jurisdiction".²²³

Schlosser referred earlier to transfers "to another court of the same category or exceptionally to a court of another category". There seems no reason to consider that in this quotation he is not referring both to horizontal transfers between sheriff courts and to vertical transfers between the Court of Session and a sheriff court.

The words "when proper proceedings are not possible" in the second last quotation certainly provide some scope for argument, but it is submitted that Schlosser's distinctions are reasonable. The first point is that the remitting or transferring of an action is very different from the upholding of a plea of forum non conveniens. For one thing where an action is remitted or transferred the other court concerned is in the same state - in fact within the same law

district. Moreover there is certainty and simplicity. The pursuer does not have to prepare fresh pleadings - quite possibly in a very different style - and then ask the other court if proceedings can in fact be brought in it. Of course in the highly unlikely event of a court to which an action was transferred making a further transfer, with the pursuer wondering when the merry-go-round would stop, the European Court might very well feel itself entitled to step in.

And the second point is that a distinction can indeed be drawn between suing in a domiciliary court and doing so in one in which the action can be brought on account of one of the rules of special jurisdiction. For of course art 2 only gives jurisdiction to the courts of the state of the defender's domicile in general, leaving it to the local law to allocate jurisdiction within the state. But art 5 provides that particular courts are to have jurisdiction; its policy is clearly different.

The statutory provisions set out above are not specifically referred to in the Act. But s 49 states:

Nothing in this Act shall prevent any court in the United Kingdom from staying, sisting, striking out or dismissing any proceedings before it, on the ground of forum non conveniens or otherwise, where to do so is not inconsistent with the 1968 Convention".

There is clearly an argument that if a court is still permitted to decline jurisdiction in favour of a foreign court on the basis of forum non conveniens, it should not consider itself unable, in appropriate circumstances, to take the less drastic step of remitting or transferring an action. But on the other hand s 16(3)(b) of the Act states that

[i]n determining any question as to the meaning or effect of any provision contained in Schedule 4

....the [Official Reports] may be considered and shall, so far as relevant, be given such weight as is appropriate in the circumstances.

Section 20(5)(b), concerning Sched 8, is in similar terms. Where jurisdiction in Scotland is being based on art 2 of Sched 4, no problem arises. For both the passage of the Schlosser Report quoted above and s 49 of the Act imply that a remit or transfer may be made. But there appears to the writer to be a strong case for saying that, if jurisdiction is being based on a provision of art 5 of Sched 4, for the sake of consistency with the Convention as interpreted by Schlosser, a remit or transfer should not be made - unless, of course, "proper proceedings are not possible" before the court seised.

What if jurisdiction is being based purely on a provision of Sched 8? Perhaps the defender is not domiciled in any EC or EFTA state. Or perhaps the action concerns the interpretation of a will, and falls outside the subject matter scope of the Conventions. In either case the particular court or courts with jurisdiction will be determined by Sched 8. In the case of the defender domiciled outside the EC / EFTA bloc, one or more of the grounds of special jurisdiction in rule 2 may be relevant. In the case of the action concerning the will, the defender may be domiciled in a particular sheriff court district, with rule 1 being applicable.

It can of course be said that rule 1 of Sched 8, like art 5 of the Conventions, determines the particular courts with jurisdiction. But the Court of Session would clearly not hold that as a result if a

court has jurisdiction on account of rule 1, a remit or transfer cannot be made. For if it were to do so, it would in effect be closing the door to remits and transfers generally. The legislature cannot have intended this. And this would be a slavish application of only one sentence in the Schlosser Report. For after all Schlosser considered that where art 2, as opposed to art 5, of the Convention is applicable, a remit or transfer can still be made. And in the art 2 context there must always be a local rule which determines the particular court or courts with jurisdiction.

But what if the action is against an American domiciliary and jurisdiction is being based on rule 2(3) of Sched 8? It could of course be argued that transferring or remitting the action should not be a course open to the court here any more than it would be if jurisdiction was founded on art 5(3) of the Conventions or, arguably, on art 5(3) of Sched 4. But, it is submitted, the Court of Session would be highly unlikely to accept this argument. And in the present writer's view it would not be at all necessary for it to do so. To accept the argument would be significantly to restrict the circumstances in which a remit or transfer can be made. Parliament enacted the provisions set out at the beginning of this chapter as provisions generally, if not invariably, available; it would be difficult to describe them as generally available if they could not be used in proceedings in which jurisdiction was based on any rule of special jurisdiction. Section 20(5)(b) merely provides that the Schlosser Report shall "be given such weight as is appropriate in the circumstances"; it is submitted that it would not be at all appropriate for it to be used to justify the courts' powers to remit

and transfer actions being restricted in the context of Sched 8.

In concluding this chapter it should perhaps be said that the Scottish courts' powers to remit and transfer actions do appear to have been marginally restricted by the coming into force of the Conventions. While the matter is not totally free from doubt, it is probably only if particular courts have jurisdiction on account of a provision of the Conventions or, possibly, of Sched 4 that the powers have been restricted.

- 1 One of the few articles on the subject is E Jayme, "Das Europäische Gerichtsstands- und Vollstreckungsübereinkommen und die Drittländer - Das Beispiel Österreich", in F Schwind (ed), Europarecht, Internationales Privatrecht und Rechtsvergleichung, 1988.
- 2 Article 59, which concerns the recognition and enforcement of judgments, will be considered in Chapter 4.
- 3 See, for example, A E Anton, Civil Jurisdiction in Scotland, 1984, p 60.
- 4 See A E Anton with P R Beaumont, Private International Law, 2 ed, 1990, pp 212 - 218.
- 5 J A Maclaren, Court of Session Practice, 1916, p 75.
- 6 W J Dobie, Law and Practice of the Sheriff Courts in Scotland, 1948, p 44.
- 7 D Maxwell, Practice of the Court of Session, 1980, p 115.
- 8 Supra, p 78.
- 9 Maclaren, supra, p 76.
- 10 Maxwell, supra, p 117.
- 11 Maclaren, supra, p 387; cf G R Thomson and J T Middleton, Manual of Court of Session Procedure, 1937, p 48.
- 12 Thomson and Middleton, supra, p 48.
- 13 A sist was granted in De Mulder v Jadranska Linijska (Jadrolinija), 1989 SLT 269.
- 14 Reported cases on the plea of forum non conveniens are cited in Maclaren, supra, pp 75 - 78, 485; Thomson and Middleton, supra, pp 46 - 48; and Maxwell, supra, pp 115 - 117.
- 15 A V Dicey and J H C Morris, The Conflict of Laws, 11 ed, L Collins gen ed, 1987, pp 389 - 390.
- 16 Supra, pp 389 - 395.
- 17 [1974] AC 741.
- 18 [1978] AC 795.
- 19 Supra, p 392.
- 20 [1984] AC 398.
- 21 At p 411.
- 22 See S O'Malley and A Layton, European Civil Practice, 1989, p

607.

23 Supra, p 607.

24 P Gothot and D Holleaux, La convention de Bruxelles du 27.9.68, 1985, p 111.

25 Report by P Jenard on the 1968 Convention, OJ 1979 No C 59/1, p 38.

26 It is generally accepted that the initial words of art 20 para one should be considered as coming at the beginning of the next paragraph too; the Convention must be interpreted more liberally than a United Kingdom statute would be.

27 See O'Malley and Layton, supra, p 607.

28 See Jenard Report, supra, pp 28 - 30, 33.

29 See O'Malley and Layton, supra, pp 466 - 469.

30 See O'Malley and Layton, supra, p 459.

31 L Collins, The Civil Jurisdiction and Judgments Act 1982, 1983, p 51.

32 Supra, p 385.

33 Supra, p 385.

34 G A L Droz, Compétence judiciaire et effets des jugements dans le Marché commun (Etude de la Convention de Bruxelles du 27 septembre 1968), 1972.

35 See, for example, O'Malley and Layton, supra, pp 486 - 487.

36 Supra, p 51.

37 Report by P Schlosser on the 1978 Accession Convention, OJ 1979 No C 59/71, para 137.

38 Supra, para 137.

39 See Schlosser Report, supra, paras 138 - 139; O'Malley and Layton, supra, pp 488 - 489.

40 As seen from art 14 para one set out above, a consumer domiciled in the EC / EFTA bloc can bring his action in the courts of the state in which he is domiciled.

41 Schlosser Report, supra, para 161a.

42 O'Malley and Layton, supra, p 596.

43 See, for example, O'Malley and Layton, supra, pp 596 - 597.

44 He has already set out his arguments on this point.

45 Supra, p 21.

46 The cases are cited in the annotated versions of the Code civil.

47 Jenard Report, supra, pp 21 - 22.

48 P 21.

49 P 21.

50 By art 4 para two.

51 At p 21.

52 P 21.

53 P 22.

54 [1990] 1 QB 361, [1989] 3 WLR 478, [1989] 2 ALLER 1006.

55 ALLER report: Neill L J at p 1075; Stuart Smith L J at p 1078; Buckley at pp 1084 - 1085.

56 [1991] 1 LLR 69.

57 Sheen J at pp 72 - 74.

58 [1990] 2 QB 631, [1990] 3 WLR 688, [1990] 2 ALLER 321.

59 ALLER report at pp 328 - 330.

60 ALLER report at p 330.

61 [1988] CLY 397, The Times 27-9-88.

62 Case 351/89; the judgment is awaited.

63 [1990] 1 LLR 177.

64 [1990] 2 QB 631, [1990] 3 WLR 688, [1990] 2 ALLER 321.

65 ALLER report at p 329.

66 T Hartley, (1989) 14 ELR 58 (European Law Review).

67 P 59.

68 P 59.

69 P 59.

70 Article 14 was set out in Chapter 2.

71 Hartley, supra, p 59.

- 72 Jenard Report, supra, pp 20 - 21.
- 73 P 20.
- 74 P 21.
- 75 Dicey and Morris, supra, pp 395 - 396; G C Cheshire and P M North, Private International Law, 11 ed, P M North and J J Fawcett, 1987, pp 234 - 237.
- 76 Anton with Beaumont, supra, p 215.
- 77 [1989] 1 LLR 588.
- 78 At p 593.
- 79 Supra, para 330.
- 80 Supra, para 329.
- 81 Supra, p 635.
- 82 [1990] 2 QB 649, [1990] 3 WLR 705, [1990] 2 ALLER 335, [1990] 2 LLR 70.
- 83 The Times 11-1-91.
- 84 Supra, p 238.
- 85 Anton with Beaumont, supra, pp 172 - 173.
- 86 Schlosser Report, supra, para 176.
- 87 At para 176.
- 88 Droz, supra, paras 216 - 217.
- 89 Supra, p 557.
- 90 The types of subject matter covered by Sections 3 - 5 of Title II of the Conventions.
- 91 Erskine, Institute, I.ii.17.
- 92 G Duncan and D O Dykes, Principles of Civil Jurisdiction, 1911, p 136.
- 93 [1893] AC 602 at p 625.
- 94 Collins, supra, p 80.
- 95 T C Hartley, Civil Jurisdiction and Judgments, 1984, p 66.
- 96 See p 80.

- 97 P 66.
- 98 Supra, para 165.
- 99 Para 167.
- 100 Para 168.
- 101 Para 168.
- 102 "Jurisdiction in Actions Concerning Foreign Land", 1987 SLT (News) 53.
- 103 At p 56, quoting Hartley, 1984, supra, p 66.
- 104 At pp 55 - 56.
- 105 P 55.
- 106 P 55.
- 107 Anton with Beaumont, supra, pp 161 - 162.
- 108 P 162.
- 109 It is commonly considered that this question was not resolved by the European Court in Rösler v Rottwinkel, [1985] ECR 99, but it is conceded that there is a contrary view; but in any event certain grey areas remain.
- 110 1990 SLT (Sh Ct) 73.
- 111 For citation see note 82.
- 112 LLR report at p 79.
- 113 Ibid.
- 114 Ibid.
- 115 Ibid.
- 116 L Collins, (1990) 106 LQR 535.
- 117 For the citations of these cases see notes 64 and 82.
- 118 At p 537.
- 119 The Times 11-1-91; use has been made of the Lexis transcripts of the judgments.
- 120 Droz, supra, para 206.
- 121 G A L Droz, "Entrée en vigueur de la Convention de Bruxelles révisée sur la compétence judiciaire et l'exécution des jugements", 1987 RCDIP 251 at p 255 (Revue critique de droit international

privé).

122 "The Brussels Convention and the Scottish Courts' Discretion to Decline Jurisdiction", 1989 JR 150.

123 Supra, para 78.

124 Ibid.

125 Ibid.

126 Droz, 1987, supra, pp 258 - 259.

127 Droz, 1972, supra, para 51.

128 Hartley, 1984, supra, pp 79 - 80.

129 A E Anton, Civil Jurisdiction in Scotland, 1984, p 66.

130 Dicey and Morris, supra, pp 398 - 399.

131 Cheshire and North, supra, pp 328 - 329.

132 D Lasok and P A Stone, Conflict of Laws in the European Community, 1987, pp 281 - 282.

133 P Kaye, Civil Jurisdiction and Enforcement of Foreign Judgments, 1987, p 1245.

134 1989 JR 150 at pp 167 - 168.

135 Pp 162 - 163.

136 ALLER report at pp 331 - 332.

137 Collins, 1983; Dicey and Morris (on international private law as a whole); Hartley, 1984; Kaye (all supra).

138 LLR report at p 78.

139 The Times 11-1-91.

140 Dillon LJ focused on Schlosser Report, supra, para 78.

141 See pp 70 -71.

142 Article 220 of the Treaty of Rome simply refers to the need to simplify formalities for the recognition and enforcement of judgments.

143 On the role of Title II in general ,see Jenard Report, pp 7 - 8, 13 - 15.

144 L Collins, (1990) 106 LQR 535.

145 Pp 538 - 539.

146 This matter is further discussed in Chapter 5.

147 Judgment was given on 15-5-90.

148 The Brussels Convention - and therefore the EC - can already be criticised on the grounds that there is discrimination against domiciliaries of third states; separating pursuers into two categories on account of their domiciles would provide further grounds for criticism.

149 See Treaty of Rome, art 220; Jenard Report, supra, p 3.

150 See O'Malley and Layton, supra, pp 667 - 668.

151 Supra, p 20.

152 C Kohler, "Practical Experience of the Brussels Jurisdiction and Judgments Convention in the Six Original Contracting States", (1985) 34 ICLQ 563 at p 578.

153 The duty of the court first seised to verify the giving of adequate notice to the defender is considered in Part II of this thesis.

154 At para 205.

155 Para 205.

156 Ibid.

157 At p 46.

158 A Dashwood, R J Hacon and R C A White, A Guide to the Civil Jurisdiction and Judgments Convention, 1987, p 50.

159 O'Malley and Layton, supra, p 871.

160 For the history of art 59, see, for example, Hartley, 1984, supra, p 8; Kaye, supra, pp 1525 - 1526.

161 Dashwood et al, supra, pp 42 and 50.

162 There would of course have been at most a choice of law rule; agreement on a common definition of domicile was not reached by those negotiating the Brussels Convention.

163 Article 59 was drafted long before the United Kingdom and Ireland introduced statutory concepts of domicile much closer than their common law concepts to "habitual residence" and the Continental concepts of domicile.

164 O'Malley and Layton, supra, p 873.

165 Supra, para 249.

166 Supra, p 872.

167 On account of art 59 para one.

168 On account of art 59 para two.

169 It was originally given effect by SI 1986 No 2027; the relevant Statutory Instrument is now SI 1987 No 468.

170 Whether it was strictly speaking necessary for s 9(2) to be included in the Act is unclear.

171 This is the view of O'Malley and Layton: supra, p 875.

172 It has been published as Command Paper Cm 1394.

173 See, for example, Collins, 1983, supra, p 50; Kaye, supra, pp 1526 - 1527.

174 O'Malley and Layton, supra, p 874.

175 Ibid.

176 Collins, 1990, supra, p 535.

177 His passages of relevance are set out in Chapter 3.

178 See Chapter 3.

179 (1986) 35 ICLQ 413 at pp 421 - 422.

180 The key words of these provisions are set out in Chapter 1.

181 Jenard Report, supra, p 8.

182 Schlosser Report, supra, paras 20 and 21.

183 Article 17 of Sched 4 was considered by the sheriff in British Steel Corporation v Allivane International, 1989 SLT (Sh Ct) 57.

184 Jenard Report, supra, pp 37 - 38.

185 Schlosser Report, supra, para 174.

186 See the second question in section (a) of this chapter.

187 Supra, p 289.

188 M Weser, "La Convention communautaire sur la compétence judiciaire et l'exécution des décisions réalise-t-elle la libre circulation des jugements dans le Marché commun?", 1973 JT 229 (Journal des Tribunaux).

189 P 229.

190 P 230.

- 191 Ibid.
- 192 Ibid.
- 193 Ibid.
- 194 Ibid.
- 195 R Van der Elst and M Weser, Droit international privé belge et droit conventionnel international, 1985.
- 196 [1979] 2 CMLR 216.
- 197 Judgment paras 11 and 12.
- 198 [1984] 3 CMLR 720.
- 199 Judgment para 20.
- 200 [1988] 2 CMLR 655.
- 201 Judgment paras 10 - 13.
- 202 Jenard Report, supra, p 38.
- 203 Underlining by the present writer.
- 204 Schlosser Report, supra, para 174.
- 205 Van der Elst and Weser, supra, vol 2, p 26.
- 206 At pp 22 - 23.
- 207 At pp 23 - 25.
- 208 At p 25.
- 209 P 26.
- 210 Droz, 1972, supra, para 187.
- 211 Para 207.
- 212 G A L Droz, Pratique de la Convention de Bruxelles du 27 septembre 1968, 1973, p 9.
- 213 Preamble para three.
- 214 W J Dobie, Law and Practice of the Sheriff Courts in Scotland, 1948, p 46.
- 215 Cf Dobie, supra, p 45.
- 216 The whole subject of remits and transfers is considered at pp 444 - 451 of I D Macphail, Sheriff Court Practice, 1988.

217 See Macphail, supra, p 451.

218 In McIntosh v British Railways Board (No 1), 1990 SLT 637, there was no consideration in the Inner House of the question of whether the courts' powers to remit and transfer actions had been restricted.

219 Schlosser Report, supra, para 80.

220 Ibid.

221 Para 81.

222 Ibid.

223 Ibid.

P A R T I I

THE DUTY OF THE COURT TO VERIFY BOTH ITS JURISDICTION AND THE GIVING OF ADEQUATE NOTICE TO THE DEFENDER

	page
1 The court's duty at the initial stages of an action: introduction	148
2 The new sheriff court rules applicable to ordinary causes	154
3 The court's duty to verify its jurisdiction	161
4 Prorogation agreements and ordinary causes	188
5 Identical actions and ordinary causes	200
6 The domicile of the defender, the giving of adequate notice to the defender and rules of court	217
7 The averring of jurisdiction as a whole	243
8 Sheriff court summary causes and small claims: specific comments	252
9 Court of Session proceedings: specific comments	261
10 The granting of decree in absence: introduction	279
11 Decrees in absence in the sheriff courts	286
12 Decrees in absence in the Court of Session	301
Notes	312

I The courts' duty at the initial stages of an action: introduction

When the new schemes of jurisdiction came into force in Scotland on 1 January 1987,¹ the Rules Councils considered it appropriate to create new rules of court regulating the averments relating to the jurisdiction of the court which should appear in summonses and initial writs. It had previously been the practice for averments of jurisdiction to be included in pleadings but, on account of both the new rules of jurisdiction themselves and the new duty apparently imposed on the courts in certain circumstances to consider ex proprio motu the question of jurisdiction and the question of whether adequate notice of the proceedings had been given to the defender, it seemed desirable for Court of Session and sheriff court rules to set out what averments should be made.

The new rules caused consternation among civil court practitioners, and much frustration was expressed in Parliament House and in sheriff court bar common rooms throughout Scotland. The first problem was in obtaining a copy of the new rules; they had been enacted by Acts of Sederunt on 13 November 1986,² but when they entered into force on 1 January 1987 very few copies were available. It was only when they were published in the Scots Law Times in the course of January 1987³ that their precise terms became widely known. The rules were generally practitioners' first points of contact with the new schemes of jurisdiction. For many they were in fact their first points of contact with European Law in the wide sense. They were sometimes seen as good examples of "people in Brussels" directly or indirectly interfering in our legal system and in fact in our way of life.

There was a most unfortunate lack of understanding of exactly what

the new rules of court meant and precisely why they had been enacted. As will by now be clear, simply reading through the Act does not enable everything to fall into place in one's mind. Uncertainties about the new sheriff court rules extended beyond solicitors to sheriff clerks and sheriffs. The rules were being interpreted in different ways in different sheriff courts. In order to obtain warrants of citation, more averments on jurisdiction had to be included in initial writs in some sheriff court districts than in others. And the practice of a particular sheriff court might change after the sheriff or sheriff clerk had learned more about, or reflected on, the new rules of civil jurisdiction.

The Maxwell Report had been published in 1980⁴, two years before the Act came into existence. In 1980 the whole matter seemed of little more than academic interest. And Anton's book on the new schemes of jurisdiction⁵ had of course been published in 1984, well before the new rules of court were drafted. The Supplement by Anton and Beaumont⁶, including the new rules of court and a short commentary on them, was published in the course of 1987. So at the beginning of 1987 there was no up-to-date Scottish commentary on the Act itself, let alone on the rules of court. (Although the Act was not in force between 1984 and 1987, there was a steady stream of case law on the Convention in the original six contracting states; there was also a growing corpus of academic writing on the Convention and Act.⁷) Moreover no notes for the guidance of practitioners were published by any official body to help smooth the introduction of the new rules. But in 1987 the writer had published in the Scots Law Times four articles in which he attempted to explain what he considered to be

important aspects of the new rules of civil jurisdiction.⁸ And practitioners benefitted considerably from the publication at p 1 of the News part of the 1987 Scots Law Times of Black's model styles.⁹ These styles did not, however, meet with universal approval.¹⁰

In the early part of 1987 the writer, along with Anton and Black, addressed seminars in Edinburgh and Glasgow on the new rules of jurisdiction in Scotland.¹¹ The questions put by the practitioners attending the seminars were principally concerned with the averments of jurisdiction which they should make in their initial writs and summonses, and with the circumstances in which they would be entitled to obtain decree in absence. Throughout the first half of 1987, in fact, many practitioners contacted Black in order to obtain guidance with regard to the new rules.

Those responsible for the rules of court in both the Court of Session and the sheriff courts also appeared to be uncertain of precisely what should be required, and amendments to the new rules were introduced.¹² The writer had two articles on the subject of the new sheriff court rules published in the Journal of the Law Society of Scotland.¹³ In them he argued the case for a fresh set of rules, placing a heavier duty on practitioners than was by that time being placed on them by the new rules as generally interpreted. He hoped that at the very least his articles would go some way to explaining why averments of jurisdiction are more important now than they were before. He hoped to see some comment, positive or negative, on his articles in the pages of the Journal, but unfortunately none appeared. Whether this was because of satisfaction with the rules, a continuing lack of understanding of them, general lethargy or some

other reason was not clear. The writer also wrote to the Junior Counsel to the Lord President, setting out his views on the new Court of Session Rules. A revision of the new Court of Session rules did subsequently take place, but it was not fully in line with what he had been suggesting.

In many ways the dust now appears to have settled. There is no longer a widespread feeling among practitioners that the new rules of court are particularly troublesome. It could be said that the rules have ceased to be new. The present generation of trainee and newly-qualified solicitors never knew the old pleading requirements. The amount of reported case law on the rules has been very small, and there now appears to be uniformity, or near uniformity, of practice throughout the sheriff courts of Scotland. But, curiously, the rules are materially different, and the practice is significantly different, in the sheriff courts from what they are in the Court of Session. No dispute concerning the interpretation of the new rules appears to have been heard in the Court of Session, either at first instance or on appeal from a decision of a sheriff. But because of the differences in the rules and the practice, it certainly cannot be assumed that, if a case does come before the Court of Session, the present sheriff court approach will be approved by the superior court, or that the whole subject will not be thought out afresh.

The writer's own views have not significantly changed from those which he expressed in the published articles. He still considers that the present rules, particularly as applied in practice, are not those best suited to enabling the courts to fulfil the obligations now imposed on them. It does not therefore seem inappropriate for him to

set out his views here, and to suggest rules to replace those at present in force. He will consider what the effect of the relevant provisions of the Act should be on the sheriff court ordinary cause rules, the sheriff court summary cause rules, the sheriff court small claims rules, the Court of Session rules for proceedings begun by summons and the Court of Session rules for petition procedure.

As the relevant principles are in each of the five contexts identical, he will only set out the issues at length in the context of the sheriff court ordinary cause rules. But as there is variation in the present rules, and as the same particular forms of words cannot be used in each of the five contexts, he will then turn to the sheriff court summary cause and small claims rules and to the two sets of Court of Session rules. The courts' duty at the stage of decree in absence being sought is of course related to their duty at the initial stages of an action. Their duty when asked to grant decree in absence will be considered at the end of this Part.

It would appear to be useful for present purposes to divide civil actions, according to subject matter, into three categories: (i) those within the scope of the Conventions,¹⁴ (ii) those outside the scope of the Conventions but within the scope of the Scottish rules of jurisdiction in Sched 8 to the Act¹⁵ and (iii) those outside the scope of both the Conventions and Sched 8.¹⁶ Included in (i) are all actions within the subject matter scope of the Conventions, even if in the particular case the Conventions do not to any extent determine jurisdiction.¹⁷ It is worth bearing in mind that the vast majority of actions within the subject matter scope of the Conventions will also be within the scope of the Sched 8 jurisdiction rules. But the

converse is not true.¹⁸ It should be noted that for the sake of brevity
an action involving the same cause of action and between the same
parties is referred to by the writer as an identical action.¹⁹

2 The new sheriff court rules applicable to ordinary causes

20

The new rules introduced on 1 January 1987 stated:

Rule 3

(2) The initial writ shall contain averments about any agreement which the pursuer has reason to believe may exist prorogating jurisdiction over the subject matter of the cause to another court.

(3) The initial writ shall contain averments about any proceedings which the pursuer has reason to believe may be pending before another court involving the same cause of action and between the same parties as those named in the initial writ.

(4) An article of condescendence shall be included in the initial writ stating-

(a) the domicile of the defender as determined in accordance with sections 41 to 46 of, and article 52 of Schedule 1 to, the Civil Jurisdiction and Judgments Act 1982; and

(b) the ground of jurisdiction of the court.

21

In 1988 rule 3(4)(a) was effectively deleted. Rule 3(4) now simply reads:

An article of condescendence shall be included in the initial writ stating the ground of jurisdiction of the court.

Looking first at rules 3(2) and 3(3) together, two issues arise concerning their interpretation. Firstly, do they extend to all civil actions and, if not, what is their subject matter scope? Secondly, do they require a pursuer, in appropriate circumstances, to make negative averments, in other words to aver that he is unaware of the existence of any relevant prorogation agreement or identical action?

So far as the first issue is concerned, the rules, considered on their own, do appear to cover all types of civil actions. But they are, in fact, generally interpreted as not being relevant in the context of, for example, actions of divorce. The rules contain no words indicating that their scope is restricted to certain categories

of civil actions. And there is no ambiguous phrase which requires the courts to consider different interpretations which could be given to it. In his article in the Journal²² the writer referred to the recent English case of Stock v Frank Jones (Tipton)²³, and set out the words of Lord Atkinson in Vacher & Sons v London Society of Compositors²⁴ quoted by Lord Scarman in Stock:²⁵

If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results.

It is a trite point that different approaches to the interpretation of legislation exist, making reference to its legal and social contexts. But it is submitted that, on account of these dicta approved by Lord Scarman, had rules 3(2) and 3(3) been statutory provisions, there would have been a strong argument to the effect that they should be regarded as applying to all types of civil actions. Whether or not that was reasonable would have been irrelevant. And for the reasons which will be given below, it should be said, it is the view of the writer that it is quite pointless for rules 3(2) and 3(3) to apply to certain types of civil proceedings, particularly proceedings outside the subject matter scope of the Act as a whole - category (iii) actions.

But the rules form part not of an Act of Parliament but of a piece of delegated legislation, an Act of Sederunt published as a Statutory Instrument. So far as the interpretation - in the broad sense - of delegated legislation is concerned, the principal question which arises is usually whether or not the particular provision is ultra vires. And the issue of ultra vires can be raised in the context of

an Act of Sederunt as well as in the context of a regulation made by a Secretary of State and published as a Statutory Instrument.²⁶ The Act of Sederunt purporting to enact the rules was issued by the Lords of Council and Session "under and by virtue of the powers conferred upon them by section 32 of the Sheriff Courts (Scotland) Act 1971, section 48 of the Civil Jurisdiction and Judgments Act 1982 and of all other powers enabling them in that behalf".²⁷

Section 48(1) enables the Court of Session to "make provision for regulating the procedure to be followed in any court in connection with any provision of this Act or the Conventions". The procedure, including pleading, in any action outside the subject matter scope of the Act cannot, it is submitted, be regarded as being "in connection with" any provision of the Act or the Conventions, so an argument that a rule concerning all types of proceedings, irrespective of subject matter, was intra vires cannot be based on s 48. Section 32 of the 1971 Act gives the Court of Session a general power to "regulate and prescribe the procedure and practice to be followed in any civil proceedings in the sheriff court". Whether that provision, and the "other powers" referred to at the beginning of the Act of Sederunt, enable the Court to make rules which are quite without point is a question primarily of administrative law, outside the scope of this thesis. Moreover, in view of the comparative ease with which rules of court may be amended, a discussion of what the rules ought to provide would appear to be much more useful than a consideration of the validity of the present rules.

If the rules are indeed intra vires, do they extend to all types of civil actions? This is a question of interpretation, in the narrower

sense, of delegated legislation. There is an unfortunate scarcity of authority on the interpretation of delegated legislation which has been held to be, or is accepted as being, intra vires.²⁸ In Hutchison v Galloway Engineering Co,²⁹ the Lord Justice-Clerk³⁰ stated that

an Act of Sederunt is not subjected to the same rigid construction as an Act of Parliament. But a Court can depart from the terms of an Act of Sederunt only where special cause is shown.

The other judges concurred with these dicta. Admittedly the facts of the case were very different from those of the actions which might result in the point under consideration being judicially determined, but it is submitted that there is much force in the argument that Lord Scarman's approach to statutory interpretation should, at least as a general rule, be extended to the interpretation of delegated legislation. On account of what little authority there is, and for the sake of consistency with the rule applicable in the context of statutes themselves, rules 3(2) and 3(3), as presently framed, should - even though the result may be somewhat undesirable - be interpreted as applying to all types of civil actions.

If courts throughout Scotland can read words into straightforward provisions of Acts of Sederunt, and effectively restrict the application of their rules as far as they see fit, this may very well lead to uncertainty and inconsistency, both of which are clearly undesirable. Questions concerning the appropriateness of rules of court should as a general rule be left to the Lords of Council and Session in their legislative capacity, advised by the relevant Rules Council. Only where the literal application of a plainly expressed rule would lead to injustice in the case before it, should the Court

as a judicial body, it is submitted, be prepared to give it a contextual or purposive construction.

Three further points should be mentioned briefly here. Firstly, rule 3(1) contains a general rule relating to the form of writ in all "ordinary causes". If it is to be used as a guide in the interpretation of rules 3(2) and 3(3), something which may or may not be justified, it must be remembered that in the sheriff court context the term "ordinary cause" embraces all proceedings other than summary causes and summary applications.³¹ It includes, for example, actions of divorce and for custody. Secondly, rule 3(5) makes special provision with regard to actions of divorce and separation, but it cannot easily be considered as replacing rules 3(2) and 3(3) in the context of these types of actions. Read literally, the rules are not mutually exclusive.

Thirdly, the question of the subject matter scope of the rules under consideration has not explicitly been the subject of judicial decision. This can be attributed largely to the general shrieval attitude to negative averments, causing the practical effects of the rules to be significantly less than they might have been; the question of negative averments is considered below. But it is implicit in the decision of Sheriff Principal Macleod in Burmy v White,³² criticised by the writer below in the context of averments of domicile, that the subject matter scope of rules 3(2) and 3(3) is restricted. Though, curiously, although he accepts the argument that the scope of the domicile rule should effectively be restricted, in his obiter dicta he fails to appreciate that a similar argument can be advanced with regard to rules 3(2) and 3(3).³³

Turning to the second issue, that of whether negative averments are required in appropriate circumstances, Black in a Scots Law Times article,³⁴ Sheriffs Principal O'Brien and Nicholson in consecutive Acts of Court³⁵ and Sheriff Principal Taylor in a judgment³⁶ have all interpreted the rules as not requiring negative averments to be made.³⁷ This is also the view of Macphail in his textbook. It is understood that the practice throughout the Scottish sheriff courts, not just those in Tayside, Central and Fife and in Lothian and Borders, is for the issues of prorogation agreements and identical actions only to be referred to in initial writs if a positive averment can be made - or, of course, if the subject is being raised by the defender. But as will be noted below, the practice in the Court of Session is different.

Having considered the present rules, we can now turn to the question of whether there should exist at all rules specifically requiring averments about prorogation agreements and identical actions to be made. Three principal issues arise here. Firstly, on account of the Act, should a pursuer be required to make particular averments concerning jurisdiction and certain other issues in his initial writ? Secondly, if he should be required to do so, ought the rules to require averments relating to prorogation agreements and identical actions? And thirdly, if such averments ought to be required, how should the rules of court be framed? In particular, should the scope of rules 3(2) and 3(3) be restricted to certain types of actions? And should they be amended so as specifically to require appropriate averments, positive or negative, to be made in all actions where, on account of their subject matter or for any other reason, the issues

of prorogation agreements and identical actions are of relevance? We shall consider the first question first. We shall then consider the second and third questions together, first in the context of rule 3(2) and then in the context of rule 3(3).

3 The court's duty to verify its jurisdiction

At common law in England and Scotland the courts do not have a duty in an action to consider their jurisdiction ex proprio motu. Referring to Wall's Trs v Drynan,³⁸ the Maxwell Report states that³⁹ "normally it is not competent for the court to refuse of its own motion to entertain a case on the ground that it lacks jurisdiction". Article 19 and art 20 para one of the Conventions appear to impose on courts of contracting states duties to consider their jurisdiction ex proprio motu in certain circumstances. Article 20 para one is particularly relevant in the present context, but as art 19 will be referred to below it is appropriate to set out the terms of both provisions.

Article 19 states:

Where a court of a Contracting State is seised of a claim which is principally concerned with a matter over which the courts of another Contracting State have exclusive jurisdiction by virtue of Article 16, it shall declare of its own motion that it has no jurisdiction.

Article 20 para one states:

Where a defendant domiciled in one Contracting State is sued in a court of another Contracting State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Convention.

In art 19 of Sched 4, "Contracting State" is replaced by "part of the United Kingdom". In Sched 8, rule 7 states:

Where a court is seised of a claim which is principally concerned with a matter over which another court has exclusive jurisdiction by virtue of Rule 4, or where it is precluded from exercising jurisdiction by Rule 4(3), it shall declare of its own motion that it has no jurisdiction.

In art 20 para one of Sched 4, "Contracting State" is replaced by "part of the United Kingdom", and "Convention" by "Title". In Sched 8, rule 8, the equivalent provision, makes no reference to the domicile of the defender and simply states:

Where in any case a court has no jurisdiction which is compatible with this Act, and the defender does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction.

Exactly what is the extent of the court's duty under art 20 para one of the Conventions and Sched 4 and under rule 8 of Sched 8? Where it appears ex facie of the initial writ that there is no jurisdiction - for example where it is stated that the defender lives permanently in France and there is no indication of a ground of special jurisdiction being available - the court clearly cannot allow the action to proceed and decree in absence to be granted. One can argue that warrant to cite the defender should not, in fact, be granted. But, on the other hand, if the action does proceed and the defender then enters appearance without contesting jurisdiction, the court will, on account of art 18 of the Conventions and Sched 4 and of rule 6 of Sched 8, have jurisdiction. The Maxwell Report states ⁴⁰ that

in view of Article 18 the clerk of court cannot refuse warrant to serve an initiating writ on grounds of lack of jurisdiction unless it is clear that another court has exclusive jurisdiction under Article 19.

It is submitted that there is much to be said for this point of view. If the practice was for a clerk of court to refuse warrant on the ground of lack of jurisdiction, art 18 and rule 6 would be rendered redundant - or at any rate they would only be applicable in the case of actions which had "slipped through the net". To refuse to allow

parties who are prepared to litigate in a particular court to do so would appear to be contrary to the spirit of the Conventions. And it certainly does not appear to have been seriously suggested that art 18 only has a "safety net" function. So, unless another court clearly has exclusive jurisdiction in a particular action, the clerk of court should grant warrant to serve the writ concerned. But of course in the event of the Scottish court clearly lacking jurisdiction, there is much to be said for the clerk of court drawing this to the attention of the sheriff in the event of the defender failing to enter an appearance during the period in which it is open to him to do so.

But what if there is no averment suggesting a lack of jurisdiction? And what is the position if the relevant averments in an initial writ all suggest that the court does have jurisdiction? Can the court then simply allow events to take their course? There have, unfortunately, been no decisions of the European Court on the interpretation of art 20 para one of the Conventions. This is perhaps not altogether surprising. The European Court can only be seised of a jurisdiction matter by an appeal court in a Brussels Convention contracting state.⁴¹ It is highly unusual for proceedings to reach an appeal court if the defender has not entered appearance. It is not likely to be in a pursuer's interest to ask a national appeal court to make a reference to the European Court, requesting it to clarify art 20 para one.

And on account of the terms of the provision, if it appears to a court that it may not have jurisdiction, and the defender has not entered appearance, it should almost certainly investigate the question of jurisdiction for itself - or, if it is an appeal court,

make a reference to Luxembourg concerning the interpretation of the relevant rule of jurisdiction of the Convention. What it should not do is focus on art 20 para one. If the European Court is called upon to clarify the duty imposed on national courts by art 20 para one, this is most likely to be in a case where the defender has "appeared" after the granting of decree and is seeking either the recall or reduction of the decree or the refusal, on account of art 27(2) of the Conventions, of the pursuer's motion for enforcement of the decree in another state. But even in these cases the court will be more concerned with the rules of jurisdiction themselves or with the rule set out in art 27(2).⁴²

No real guidance can be obtained from any of the four decisions of national courts of contracting states which refer to art 20 para one and which are to be found in the D Series Digest.⁴³ The matter does not appear to have been considered judicially in England and, as is noted below, what little Scottish case law there is concerning the court's duty to question its jurisdiction does not refer to art 20 para one and can generally be regarded as unsatisfactory. The textbook writers on the whole merely paraphrase the provision of the Conventions and then refer to the passages on art 20 in the Jenard Report. In his section "Scope of the Convention", Jenard's second subsection is headed "The Binding Nature of the Convention". He states that "[t]he courts must apply the rules of the Convention whether or not they are pleaded by the parties".⁴⁴

The example which Jenard goes on to give may lead the reader to wonder if the court's duty only arises if and when the defender enters an appearance.⁴⁵ However if one returns to art 20 para one, one

sees that one of the conditions for it being applicable is that the defender has not entered an appearance. And of course art 18 makes it clear that if an appearance is entered and jurisdiction is not contested at all, the court concerned will as a general rule have jurisdiction. Perhaps what Jenard is trying to show is that the duty to consider the question of jurisdiction arises in any action where the defender does not enter appearance and fully accept that the court has jurisdiction. It is curious if on the one hand the Conventions imply that the duty only arises where the defender does not enter an appearance, and on the other hand Jenard implies that it may arise even where an appearance is entered. It will only be in an extremely small number of actions that, as in Jenard's example, jurisdiction is disputed but, wrongly, no reference is made by the defender to an applicable rule of the Conventions. But this possibility will be considered again below.

Article 19, it should be said, appears to be applicable regardless of whether or not appearance is entered.⁴⁶ But art 19 concerns the grounds of exclusive jurisdiction alone, and Jenard's example does not relate to exclusive jurisdiction. Jenard comments that art 19

emphasises that the court must of its own motion declare that it has no jurisdiction if it is seised of a matter in which the courts of another Contracting State have exclusive jurisdiction by virtue of Article 16.⁴⁷

Turning to art 20, which is central to the question of the court's duty to verify its jurisdiction, Jenard begins his section on this provision by stating that it "is one of the most important Articles in the Convention".⁴⁸ The thrust of what he goes on to state here is that, where the Convention is applicable and the defender does not

enter appearance, the court must play an active role in determining whether or not it has jurisdiction. It cannot just sit back and make assumptions. In view of the importance which he gives to this matter, it seems useful to set out his dicta in full. He states that art 20⁴⁹

applies where the defendant does not enter an appearance; here the court must of its own motion examine whether it has jurisdiction under the Convention. If it finds no basis for jurisdiction, the court must declare that it has no jurisdiction. It is obvious that the court is under the same obligation even where there is no basis for exclusive jurisdiction. Failure on the part of the defendant to enter an appearance is not equivalent to a submission to the jurisdiction. It is not sufficient for the court to accept the submissions of the plaintiff as regards jurisdiction; the court must itself ensure that the plaintiff proves that it has international jurisdiction.

The object of this provision is to ensure that in cases of failure to enter an appearance the court giving judgment does so only if it has jurisdiction, and so to safeguard the defendant as fully as possible in the original proceedings. The rule adopted is derived from Article 37(2) of the Italian Code of Civil Procedure, by virtue of which the court must of its own motion examine whether it has jurisdiction where the defendant is a foreigner and does not enter an appearance.

Jenard says nothing here about any duty where an appearance is entered; there is no reference to his words previously quoted. The significance of this is unclear.

In the Report on the other principal Convention, it is affirmed by Jenard and Möller that Article 20⁵⁰
⁵¹

is a particularly important provision where the defendant fails to enter an appearance....A judge required to apply the Lugano Convention must declare of his own motion that he has no jurisdiction unless his jurisdiction is derived from the provisions of....that Convention.

There are interesting, although not unambiguous, comments on art 20⁵² para one in the Schlosser Report and in Droz's principal work. Droz's work appeared before Schlosser's, so we shall consider his comments first. Because of the scarcity of authority on such an important⁵³

matter, and the fact that his words carry greater weight than those of most textbook writers, lengthy quotation does not seem out of place. Droz states that⁵⁴

[1]'obligation de se déclarer d'office incompétents implique donc que les juges des Etats membres de la Communauté devront, dans l'avenir, vérifier systématiquement leur compétence chaque fois qu'ils constateront que le défendeur ne comparaît pas et que l'assignation vise une personne domiciliée dans un autre Etat contractant. Pour mener à bien cette recherche, ils devront disposer d'un pouvoir d'investigation qui leur permette de vérifier les allégations du demandeur concernant la compétence.

Article 20 para one, he states, is inspired by art 39(2) [sic] of the Italian Code of Civil Procedure,⁵⁵ which requires judges to look into the question of jurisdiction where the defender is a foreigner. The provision will, he asserts, require French judges to do more than they are required to do by art 171 of their Code of Civil Procedure. When it comes into force, as a general rule - in other words not only in actions concerning real rights - French judges will have to regard questions of jurisdiction as being questions to which they should address themselves ex proprio motu.⁵⁶

In his paragraph quoted above, Droz states in effect that, on account of art 20 para one, the question of jurisdiction should be investigated where it seems from the pleadings that the person who is being sued and who has not appeared is domiciled in another contracting state. After all, art 20 para one refers to "a defendant domiciled in one Contracting State....sued in....another". But he goes on to make the very important point that

on peut penser que la vérification d'office de la compétence pourrait et même devrait intervenir bien que le demandeur allègue que le défendeur est domicilié sur le territoire du tribunal saisi. S'il en est réellement ainsi, l'article 20 ne s'applique pas mais encore

57

faut-il qu'on en soit sûr.

In other words, the court should consider the question of jurisdiction even where it is stated or averred that the defender is domiciled in the state of the court seised. The statement or averment may not be correct. Those advancing the argument that by simply reading the pursuer's averments on jurisdiction the court may not be fulfilling the duty imposed on it by art 20 para one will find support in Droz's last statement quoted above and in his statement that

[i]l semble que le juge saisi puisse exiger du demandeur des explications complémentaires lorsque l'assignation laisse planer quelques doutes sur la réalité d'un domicile dans le pays du tribunal.⁵⁸

It should be said that he concludes this section by admitting that

[d]ans bien des cas cependant l'allégation du demandeur aura toutes les apparences de la vérité, et le défendeur n'aura pratiquement pas d'autres moyens que de comparaître pour décliner la compétence en contestant les affirmations du demandeur.⁵⁹

Article 20 para one, in other words, is designed to give protection to defenders. But there will be occasions when it is not successful.

So precisely what steps should a Scottish court now take in the fulfilment of its duty to "examine whether it has jurisdiction", or in the words of the French text to "vérifier son compétence"? There is a wish on the part of many individuals to have the traditional Scottish practice changed as little as possible. The relevant passages in the Schlosser Report have been used to support the argument that the courts need not question their jurisdiction in actions where there is no reason to believe that jurisdiction does

not exist. But these passages are, in the words of the Maxwell
Report,⁶⁰ "far from clear". They do not appear to be well thought-out,
and a coherent argument is certainly not well expressed in them.

⁶¹
Schlosser begins by stating that

[u]nder Articles 19 and 20 of the 1968 Convention the provisions concerning "direct jurisdiction" are to be observed by the court of its own motion: in some cases, i.e. where exclusive jurisdiction exists, irrespective of whether the defendant takes any steps; in other cases only where the defendant challenges the jurisdiction.

What he says in the context of exclusive jurisdiction is correct, although of course it does not tell us anything about the particular steps which a court must take in the observance of the rules of jurisdiction. The French version of the Schlosser Report, it should be said, simply uses the words "le juge doit respecter d'office les règles relatives à la compétence directe". Schlosser's dicta here which refer to art 19 are nevertheless in line with those of Jenard and other writers.⁶²

But so far as the "other cases" are concerned, the dicta are quite simply wrong. The duty imposed by art 20 para one arises where the defender does not enter an appearance and challenge the jurisdiction. And the statement that the jurisdiction provisions are to be observed ex proprio motu where jurisdiction is challenged is somewhat strange. Jenard and Droz refer to the situation where a defender enters appearance challenging the jurisdiction of the court by reference to rules outside the Convention, and the court proceeds to apply the rules of the Convention.⁶³ But because of the words "does not enter appearance" in art 20 para one, such a consideration by the court cannot be based on art 20. And if Schlosser had had this situation in

mind, presumably he would have made this clear. The French language version of the passage, it should be said, is no better expressed:

....le juge doit respecter d'office les règles relatives à la "compétence directe", soit....soit seulement lorsque le défendeur conteste la compétence du juge.

This initial sentence certainly does not encourage the reader to attach great weight to the passages in the Schlosser Report under consideration.

"It does not necessarily follow from Articles 19 and 20 of the 1968 Convention", states Schlosser⁶⁴

that the courts must, of their own motion, investigate the facts relevant to deciding the question of jurisdiction, that they must for example inquire where the defendant is domiciled. The only essential factor is that uncontested assertions by the parties should not bind the court.

It is, at least initially, difficult to see how these words can be reconciled with the dicta of Jenard and Droz quoted above. And to the present writer, the simple form of words "shall declare of its own motion" which is to be found in art 20 para one appears in effect to be imposing an obligation on courts to look into the matter of jurisdiction in actions where no appearance has been entered. If there is no jurisdiction, the court must declare this. It must address itself to the matter before it can make the declaration. If Schlosser is saying that the court cannot look behind the averments made by the pursuer, then it is submitted that he is wrong.

⁶⁵
Schlosser continues:

....the following rule is reconcilable with the 1968 Convention: a court may assume jurisdiction only if it is completely satisfied of all the facts on which such jurisdiction is based; if it is not so

satisfied it can and must request the parties to provide the necessary evidence, in default of which the action will be dismissed as inadmissible....Whether a court is itself obliged to investigate the facts relevant to jurisdiction, or whether it can, or must, place the burden of proof in this respect on the party interested in the jurisdiction of the court concerned, is determined solely by national law. Indeed some of the legal systems of the original Member States, for example Germany, do not require the court itself to undertake factual investigations in a case of exclusive jurisdiction, even though lack of such jurisdiction has to be considered by the court of its own motion.

66

Just what does all this mean? In the Maxwell Report it is stated that Schlosser

appears to suggest that the court is not obliged always to investigate the facts on which jurisdiction is based. If from the pursuer's pleadings it appears there is no real doubt as to jurisdiction, the court can proceed. If it appears there is doubt, the court must request the parties to provide the necessary evidence....National law will determine whether the court itself will investigate the facts or whether it will place the burden of proof on the pursuer.

In referring to these passages of the Schlosser and Maxwell Reports,
67
Anton and Beaumont state that

[i]t seems likely....that, unless averments of the pursuer, if substantiated, would not allow the court to assume jurisdiction or unless the court is put on its guard in the circumstances of the case, the court may accept as true the averments of the pursuer as to the grounds of jurisdiction. It will frequently have no alternative.

Returning to Schlosser's words, "the party interested in the jurisdiction of the court concerned" does not seem a particularly useful form of words. Presumably, as the Maxwell Committee believed, he means the pursuer, but as he has referred earlier in the sentence to the court requesting the "parties" to provide evidence, one cannot be absolutely sure. Of course contrary to what Schlosser appears to believe, the art 20 para one duty only arises where the defender does not enter an appearance. He cannot very easily be requested to

provide evidence!

While Schlosser's language does indeed provide much scope for argument, it is submitted with all due respect to the Maxwell Committee and to Anton and Beaumont that the correct interpretation of the passage quoted is not that the court can proceed if there is nothing in the pursuer's pleadings which gives it a real doubt as to jurisdiction. And it is nonsense to say that the court will frequently have no alternative to accepting the pursuer's averments as true. It could of course request some comments on these averments by the pursuer's solicitor at the bar of the court. Or it could seek affidavits, signed by the pursuer and a witness, on the issues referred to in the averments. Or it could even order a parole proof.

It would generally be accepted that one of these steps would be appropriate in the event of the averments of the pursuer casting doubt on the jurisdiction of the court. But what is the court's duty where the averments are clear and unambiguous, where it appears ex facie of the initial writ that there is jurisdiction? Here the present writer's interpretation of Schlosser's words is as follows. Before it can hold that it has jurisdiction in an undefended action - any undefended action within the scope of the Conventions - a Scottish court must satisfy itself that the pursuer's pleadings correctly outline the factual situation; it must be "completely⁶⁸ satisfied of all the facts". If the pursuer has not provided it with the necessary evidence, it must ask him to do so; "it can and must request the parties [ie the pursuer] to provide the necessary⁶⁹ evidence". If he fails to provide evidence which satisfies the court, the action must be dismissed; "in default of which the action will be

70
dismissed".

Schlosser is not saying that clear and unambiguous averments are acceptable. A court cannot be "completely satisfied of all the facts" merely through reading averments; that is why, for example, in certain consistorial causes an undefended proof on the merits is required in the event of the defender failing to enter an appearance. In a consistorial cause the court concerns itself with the interests of any children and of society as a whole; in an undefended action within the scope of the Conventions, it is being required to concern itself with the interests of the absent defender and, arguably, of society. This interpretation of Schlosser's words is of course in line with the approach of Jenard and Droz and, it is submitted, with a straightforward interpretation of art 20 para one. Moreover it can be supported by reference to the second part of Schlosser's passage quoted above (the part beginning "Whether") and to the French language version of the Schlosser Report.

It is submitted that the meaning of the second part of the passage quoted above is this. In certain legal systems a court will verify particular points by investigating matters for itself ("rechercher lui-même les faits" in the French version); it will examine witnesses itself and it will send out its officers to collect the required evidence. In other legal systems, by contrast, the court will require the pursuer to lead what it considers to be sufficient evidence on each crucial matter ("imposer à la partie....de produire les justifications nécessaires"); until he does so, the point is not considered verified and the action cannot proceed. The Brussels Convention does not affect the approach traditionally taken in any

legal system to the verifying of points which arise. There must be verification of jurisdiction in undefended actions, but as far as the European Court is concerned it may be carried out either by means of an investigation by officers of the local court or by means of the examining of evidence led by the pursuer.

The method of verification, he is stating, will vary from state to state; but at the same time, he is implying, the thoroughness of the verification will not. The Convention, after all, is not designed to harmonise civil procedure throughout the contracting states; but as the European Court has made clear the interpretation of its provisions should be the same throughout the contracting states. So long as the two courts both have a sufficiently thorough approach to their task, it is perfectly satisfactory for a Continental court to declare its jurisdiction or lack of it on the basis of the enquiries which it has itself made; it is equally acceptable for a Scottish court to do so on the basis of its assessment of the pursuer's evidence.

Turning to the French version of the Schlosser Report, the text of the first part of the passage quoted above is:

....le système exposé ci-après est compatible avec la convention: bien que le juge ne puisse se déclarer compétent que s'il est pleinement convaincu de l'existence de tous les éléments de fait qui justifient sa compétence, il pourra ou devra demander aux parties, tant qu'il n'a pas acquis cette conviction, de lui fournir les preuves requises. A défaut, la demande devra être déclarée irrecevable.⁷¹

It is suggested that a good translation of the words from the colon to the end of the sentence would be as follows:

although the court may only hold that it has jurisdiction if it is

fully satisfied that there exist all the elements which are inherent in its jurisdiction, insofar as it is not satisfied on this matter it may or must ask the parties to provide it with the necessary evidence.

In other words, if the court has not ascertained for itself that it has jurisdiction, it may ask the parties to provide the evidence. In his view, it is submitted, it could be fully satisfied without calling on the parties to provide evidence only if it had investigated matters for itself, not if it had merely read one or two sentences. This is implied by the use of "bien que" ("although") if by nothing else. The use of this expression in the context implies that in his opinion the basic rule is that the court should investigate matters for itself, but nevertheless it is perfectly acceptable for the parties to be asked to provide appropriate evidence. As a Continental lawyer, it could be said, Schlosser was thinking in terms of an investigation by the court itself as being the norm, and the leading of appropriate evidence as being an acceptable variation. (There is of course no word corresponding to "bien que" in the official English language version of the Schlosser Report.)

A further point is that the existence of the semicolon after "based" in the English language version may encourage the belief that the court can be satisfied without evidence being led, without it being given any more than bare averments. For the word "evidence" only forms part of the phrase following the semicolon. But in the French version there is a comma rather than a semicolon, and the whole sentence "hangs together" much more than the English language one does. So the writer's interpretation of the sentence, that something more than a simple assertion by the pursuer is always required, might

very well be accepted more readily by the average French reader. And of course the French language version of a European Community paper could be said to be generally regarded as primus inter pares.

This interpretation of what Schlosser describes as a rule "reconcilable with the 1968 Convention" enables a reasonable interpretation to be given to his earlier statement that the courts need not, of their own motion, "investigate the facts relevant to deciding the question of jurisdiction". If "investigate" is interpreted as "have examined by officers of the court acting independently from the pursuer", then the statement is not irreconcilable with the dicta of Jenard and Droz.

After his strange initial statement on the effects of arts 19 and 20
72
quoted above, Schlosser states that a court must

of its own motion consider whether there exists an agreement on jurisdiction which excludes the court's jurisdiction and which is valid in accordance with Article 17.

What he is in effect saying, it is submitted, is that the question of the existence of a valid prorogation agreement should be considered by the court in the light of either an investigation which it and its officers have themselves carried out or the providing of evidence or making of submissions by or on behalf of the pursuer. If the existence of a valid prorogation agreement is relevant to jurisdiction, then it would appear to be the case that it should indeed be examined in one of these ways. For, as Schlosser goes on to state, in the case of an undefended action a court can only allow the proceedings to continue if it is "completely satisfied of all the
73
facts on which....jurisdiction is based".

As has been made clear, the present writer interprets these words as meaning, in the Scottish context, that mere averments are insufficient. But even if he is wrong and averments are sufficient, it would appear to be Schlosser's view that these averments must cover all the factors which are inherent in the jurisdiction of the court. If the lack of a prorogation agreement in favour of another court, and the lack of an identical action in another court, are factors inherent in the jurisdiction of the court, then it would seem that they should be covered by the averments. This matter will be considered in detail later in this chapter.

It should finally be mentioned that Schlosser refers to the impact of arts 19 and 20 in the United Kingdom. He states:⁷⁴

An obligation to observe the rules of jurisdiction of its own motion is by no means an unusual duty for a court in the original Member States. However, the United Kingdom delegation pointed out that such a provision would mean a fundamental change for its courts. Hitherto United Kingdom courts had been able to reach a decision only on the basis of submissions of fact or law made by the parties. Without infringing this principle, no possibility existed of examining their jurisdiction of their own motion.

Precisely what should be made of this passage? Does it cast doubt on the present writer's interpretation of the other passages? It is conceded that it is somewhat opaque. Exactly what the United Kingdom delegation stated, and what Schlosser understood English law and Scots law to be, are not clear. It was correct to say that if English and Scottish courts had to observe their rules of jurisdiction ex proprio motu, this would mean a fundamental change. So far as the third and fourth sentences of the passage are concerned, all that they may mean is that at common law disputes concerning jurisdiction

were approached in the same way as disputes concerning the merits of an action. The courts would come to their decision on the basis of the evidence led; in principle they would not ask questions about issues not raised by the parties. But in order to do their duty in terms of the Convention, they could not confine their attention to the evidence concerning the matters which the parties had chosen to refer to within the four corners of the written pleadings.

But of course as a general rule the duty to verify jurisdiction imposed by the Conventions only arises where the defender does not enter an appearance. Here, as elsewhere, it is not clear if Schlosser fully appreciates this point. And it is in the context of undefended actions that the effect of art 20 para one does appear to be highly significant, requiring a fundamental change in procedure. At common law the courts could simply accept the pursuer's uncontested averments of jurisdiction; in terms of the Convention they cannot do so. The present writer suspects that this was in fact the point which the United Kingdom delegation was trying to make. But this is not clear, and further speculation about this particular passage in the Schlosser Report would seem to be of little value.

The present writer has from time to time been asked what the approach of Continental courts is to the matter of the verification of jurisdiction. Do they require lengthy statements relating to jurisdiction in all documents instituting court proceedings? Do judges as a matter of course have investigations carried out by assistants or by clerks of court? No systematic study of the relevant rules and practices in the various states appears as yet to have been carried out. The writer's impression is that the requirements vary

significantly from state to state. There is considerable variation not only in what a pursuer is required to state but also in the extent of the obligation which is considered to be imposed on the courts by arts 19 and 20. But of course a failure to examine jurisdiction *ex proprio motu* in Scottish courts could not be justified on the grounds that there is a similar failure in the courts of certain other legal systems in the EC.

In considering what averments relating to the jurisdiction of the court a pursuer ought to be required to make, it should not be forgotten that in Continental legal systems in both civil and criminal proceedings the court - in other words a judge - plays a much more active role than it / he does in proceedings in the legal systems of the British Isles. Their systems, it is sometimes said, are inquisitorial; ours are adversarial. While the differences may at times be exaggerated, and matters are oversimplified, differences undoubtedly exist and are of relevance in the context of the courts' duty to verify jurisdiction. As the French judicial system as a whole is significantly different from the English judicial system as a whole, what is appropriate in a particular context in French law may not be appropriate in the same context in English law.

A Continental examining magistrate, sitting at a desk discussing a case with the lawyer who has instituted it, is in a much better position than a Scottish sheriff to resolve the questions of jurisdiction. The Continental magistrate has far less need of written statements; if he is in any doubt he can much more easily ask the lawyer the necessary questions face to face. It may be because of the much closer involvement in civil proceedings of Continental judges

that in the Schlosser Report it was stated that "further clarification" of art 20 was not necessary. On the other hand this statement may as much as anything be the result of the fact that, for the reasons given above, references relating to art 20 para one are not likely regularly to be made to the European Court, and none have so far been made.

To sum up, it appears to the writer that the implication of the paragraphs of the Jenard Report quoted above is that averments by the pursuer on the various matters relevant to jurisdiction may not always be sufficient. In at least certain actions where the defender fails to enter an appearance, it may be appropriate for the court to hear submissions by the pursuer's solicitor or counsel in chambers, for affidavits on the question of jurisdiction to be lodged or even for a parole proof on jurisdiction to take place. In other words, a somewhat onerous duty is imposed on national courts by art 20 para one. Precisely how onerous this duty is, and at exactly what stage it must be fulfilled, are, it must be admitted, matters which are not clear. But the duty exists and, for the reasons which will be given below, the fact that the presence of averments on jurisdiction in the initial writ may not by itself enable the court to fulfil its duty certainly does not mean that the averments should not be required to be made.

The passages taken from Droz's work, and the passages of the Schlosser Report as interpreted by the present writer, support these assertions. So too, it is submitted, does a straightforward reading of art 20 itself. Moreover, further support is obtained by referring to the Preamble to the Convention and to Title III. The Preamble

76
contains the words:

The High Contracting Parties to the Treaty establishing the European Economic Community,

.....
Anxious to strengthen in the Community the legal protection of persons therein established
.....

It would seem to be perfectly in keeping with this statement for courts to be required actively to verify their jurisdiction in any action in which the defender does not appear. In that way persons established in the Community have their legal protection strengthened; they are less likely to find that judgments have been obtained against them in courts which did not in fact have the necessary jurisdiction. And Title III sets out a straightforward scheme for the recognition and enforcement in one contracting state of a judgment given in another. As a general rule if a court in one state is asked to enforce a judgment given in another state, it cannot examine the jurisdiction of the court which gave the judgment.⁷⁷ It therefore seems important for courts fully to examine their own jurisdiction before giving judgment.

To conclude this section, in all category (i) actions in which the Conventions are applicable, and the defender does not enter an appearance, the court has at least to some extent a duty to investigate the question of jurisdiction. If the court establishes that the defender in an action is not domiciled in another contracting state, it is no longer under a duty to take any steps to comply with art 20 para one of the Conventions. But if it does not establish this, then it must look into the whole question of its jurisdiction over the defender. As was noted in Part I, there may be

a category of local or internal actions to which the Conventions as a whole do not apply. But because of the doubts surrounding this matter, and because, as Droz implies, statements that the defender is domiciled in the territory of the court and the action is purely a "local" one may not be correct, at present the proper course, it is submitted, is for it to be assumed that there are no types of category (i) actions where art 20 para one of the Conventions can be treated as irrelevant. And, finally, as was noted above, Jenard and Droz imply that, where a defender appears and contests jurisdiction without making any reference to the Conventions, the court has a duty to consider whether it has jurisdiction in terms of the Conventions.

As has been seen, art 20 para one is applicable in the case of defenders domiciled in other contracting states. What is the position with regard to category (i) actions when it is made clear beyond any reasonable doubt that the defender who has not appeared is domiciled in the United Kingdom, and so art 20 para one of the Conventions imposes no (further) obligation on the court? And what is the position with regard to category (ii) actions? The art 20 para one in Sched 4 was referred to above, and rule 8 in Sched 8 was set out. What we are concerned with here is whether the Scottish courts should interpret the expression "shall declare of its own motion" in art 20 para one of Sched 4 and in rule 8 of Sched 8 in the same way as it is interpreted by Jenard and Droz in the context of the Conventions. The courts are not bound to do so. The effect of ss 16(3)(a) and 20(5)(a) of the Act is that where a provision of the Conventions is to be found in identical terms in Schedules 4 and 8, in interpreting the provision in the Sched 4 or 8 context any decisions of the European Court are only of persuasive value.⁷⁸ And ss 16(3)(b) and 20(5)(b)

state that, in such a situation, the Jenard and other Reports

may be considered and shall, so far as relevant, be given such weight as is appropriate in the circumstances.

There is of course considerable merit in an expression being given the same interpretation in Scheds 4 and 8 as in the Conventions, and it is submitted that it should at present be assumed by both the judiciary and the drafters of the Rules of Court that the same onerous duty to investigate the question of jurisdiction arises, in the event of the defender failing to enter appearance, in all category (i) and category (ii) actions.

It should be said that in the brief report of Hestair Management Services v GHH Transport Services⁷⁹ it is stated that "the court [ie the sheriff principal hearing the defender's appeal against the refusal of his reponing note] was satisfied, on ex parte statements, examination of documents, and admissions, that the requirements of the Civil Jurisdiction and Judgments Act 1982, Sched. 8, para 8, were met". But if, as would appear to have been the case, it was only Sheriff Principal Taylor who considered the question of jurisdiction, the requirements of rule 8 were not met by the court of first instance. And in Northamber v Benson,⁸⁰ where the court brought up the question of jurisdiction ex proprio motu when decree in absence was sought, the sheriff's note does not refer to any of the provisions which we have been considering; reference is only made to one of the rules of court considered at the end of this Part. The reports of these Scottish cases are of very little value in the interpretation of art 20 para one of the Conventions and Sched 4 and of rule 8 of Sched 8.

So far as category (i) actions are concerned, Sched 4 applies to most types of actions within the subject matter scope of the Conventions.⁸¹ It will be interpreted by English and Northern Ireland judges as well as by Scottish judges. It would be most unfortunate if its provisions were to be interpreted in different ways in different United Kingdom law districts, and it is submitted that, in view of the lack of authority on this matter in England, the Scottish courts should do what they can to bring about, throughout the United Kingdom, a common approach to the interpretation of the Sched 4 provision which is in line with what appears to be regarded as the correct interpretation of art 20 para one of the Conventions.

But should a pursuer be required to make averments in his initial writ relating to all the matters which affect the jurisdiction of the court? Or, as the court's duty under art 20 para one of the Conventions and Sched 4 and under Rule 8 of Sched 8 only arises where the defender does not enter an appearance, would it not be sufficient for the pursuer to be required to put the court in the picture at the stage of lodging a minute for decree? As the court cannot be sure at the initial stages if the defender is going to enter appearance or not, it cannot then be under a duty imposed by art 20 para one; the duty cannot arise before a hearing at which the defender could be represented has taken place or the period laid down for lodging defences has ended.

There is nothing in the Conventions themselves or in the Jenard Report to suggest that the court's duty to consider the question of jurisdiction only arises when decree in absence is being sought. It

is appreciated that in the majority of undefended actions the defender would not be prejudiced by the court only considering the question when a minute for decree is lodged. But it is submitted that, until the European Court has had the opportunity to clarify the point, the drafters of the Rules of Court should assume that the court's duty arises at a much earlier stage than that of the pursuer seeking decree in absence. It certainly seems doubtful to the present writer if, in an action as yet undefended, a court should, other than in a situation in which urgency is required and art 24 of the Conventions and Sched 4 is of relevance, make an interim award without first considering the question of jurisdiction.

Moreover, it would appear to be both wrong in principle and unsatisfactory in practice for a pursuer to be required to make averments relating to certain matters concerning jurisdiction in the initial writ, but only at a later stage to be required to make statements relating to certain other jurisdiction matters. Let us take the case of an action in Edinburgh sheriff court against a defender domiciled in Glasgow and concerning a contractual obligation which ought to have been performed in Edinburgh. Concentrating for the sake of the discussion on Sched 8, if Edinburgh sheriff court does have jurisdiction then, as will be seen below, it will be partly because the conditions in rule 2(2) are satisfied, and partly because there is no prorogation agreement in terms of rule 5 in favour of another court. If the court must consider the question of jurisdiction, and the pursuer should (following the traditional practice) make averments relating to rule 2(2), should he not also make averments relating to rule 5?

There is clearly much to be said for all of a pursuer's statements on the matter of jurisdiction appearing in one item of process. And if a pursuer makes, in his minute for decree, a point relating to jurisdiction which he did not make in his initial writ, ought the defender not, in some way, to be made aware of this point? And if affidavits on, inter alia, the existence or non-existence of a prorogation agreement are required, would it not be wrong for these to be accepted in the event of the initial writ containing no averment relating to this matter? Certainly the initial writ could be amended, with this amendment being intimated to the defender, but it would have been much simpler - and cheaper - for an appropriate averment to have been included in the initial writ from the outset.

It is worth mentioning that more than fifty per cent of sheriff court actions appear to be undefended.⁸² So in the majority of actions which a practitioner brings, and in the majority of actions coming before a court, the court is likely to be required by art 20 para one and / or rule 8 to consider the matter of jurisdiction. As a result, in view of the various passages quoted above, it does not seem unreasonable to the writer for the practitioner to be required to make averments in each of his initial writs concerning each of the various factors which are inherent in the question of jurisdiction. In the Maxwell⁸³ Report it is stated that

Article 20 is subject to two limitations:

- a The defender must be domiciled in another Contracting State....
- b Article 20 only applies where the defender does not enter appearance....

It is thus in only a very small minority of cases that Article 20 will be relevant.

This, it is submitted, is somewhat misleading. For it seems that in

most actions the defender does not enter appearance. And a court can only hold that art 20 is irrelevant if it is satisfied that the defender is not in fact domiciled in another contracting state. And of course it must not be forgotten that the Maxwell Report was prepared before provisions parallel to art 20 para one were enacted for the intra United Kingdom and Scottish contexts too.

As has been noted, it seems from the dicta of Jenard and Droz that where a defender contests the jurisdiction of the court without reference to the Conventions, the court has a duty to consider its duty in terms of the Conventions. Again, the court will be in a much better position to do this if, right from the beginning of the proceedings, it has been provided with averments concerning the factors inherent in its jurisdiction - a starting point for its verification of its jurisdiction.

4 Prorogation agreements and ordinary causes

It seems appropriate first briefly to consider certain aspects of the provisions of the Conventions which are concerned with prorogation agreements. These provisions are to be found in arts 12, 12A, 15 and 17. Articles 12 and 12A relate to actions regarding contracts of insurance⁸⁴ and art 15 relates to actions regarding consumer contracts.⁸⁵ Article 17 is concerned with prorogation agreements more generally. The articles are all somewhat lengthy and it is not possible to set them out here. Various problems of interpretation exist, particularly relating to art 17. Anton believes that this article has "a deceptive⁸⁶ air of simplicity" and is "in reality a complex provision". The article has now been the subject of several decisions of the European Court.⁸⁷

It would seem to be the effect of art 16 itself and the reference to art 16 in art 17 para three that there cannot be a valid prorogation agreement in favour of courts in the contracting states if the subject matter of the action falls within the scope of one of the art 16 exclusive jurisdiction provisions. It might have been suggested that there can be a prorogation agreement covering actions within the scope of art 16 if it is one giving jurisdiction to certain chosen courts as well as to the courts of the locus - in other words, not an agreement expressly or implicitly taking away jurisdiction, the type of agreement against the existence of which courts must be on their guard. But in the light of the decision of the European Court in Rösler v Rottwinkel,⁸⁸ such an agreement would not appear to be valid in terms of the Conventions.

It is not clear from art 17 para one if a prorogation agreement in

favour of a court of a non-contracting state will have the effect of excluding the jurisdiction of the courts of the contracting states. On this, as on many other points concerning art 17, the Jenard Report does not significantly assist us.⁸⁹ But the one thing which is clear is that, if an action falls within the scope of the Conventions, there may, at any rate if it is a non-exclusive jurisdiction action, be a prorogation agreement which will have the effect of excluding the jurisdiction of all courts within the contracting states other than that or those agreed upon.

In Sched 4 to the Act, the terms of art 17 are similar to those of the Conventions. But the changes which have been made seem to go beyond the minimum which would have been required to adapt art 17 to intra-United Kingdom jurisdiction. The word "exclusive" does not feature in art 17 para one of Sched 4, and it would appear to be the case that, where the prorogation provisions of Sched 4 but not of the Conventions are applicable, the jurisdiction of the court or courts agreed upon will simply be concurrent with that of the court or courts having jurisdiction by virtue of the other provisions of the Schedule.⁹⁰ So, if this interpretation is correct, in proceedings where the defender is domiciled in England, and there is a prorogation agreement in favour of the Court of Session, the English High Court will be able to exercise jurisdiction, at least if it is the court first seised of the dispute. Of course this assertion is based on the assumption that in "intra-United Kingdom" actions the Conventions are irrelevant. And, as was noted in Part I, this assumption, although widespread,⁹¹ may not be correct.

In Sched 8, rule 5 is concerned with prorogation agreements. Rule

5(1) states:

If the parties have agreed that a court is to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court shall have exclusive jurisdiction.

It may be that the effect of rule 5(5) is that, where jurisdiction is being determined by the provisions of Sched 8, there cannot be a valid prorogation agreement in an action which, by reason of its subject matter, falls within the scope of one of the exclusive jurisdiction provisions in rule 4. But on the other hand there is an argument that a prorogation agreement giving jurisdiction to courts other than, and in addition to, those of the locus would be valid.⁹² Such an agreement would not, however, be of the type against the existence of which courts should be on their guard.

It will be noted that in rule 5(1) the reference is simply to "a court"; it is not to "a court in Scotland", "a court in the United Kingdom" or "a court in the Contracting States to the Conventions". It is not clear if the prorogation of the jurisdiction of a court in Uruguay could have the effect of excluding the jurisdiction which the Scottish courts would otherwise have in terms of the Act. An argument that it would, at least as a general rule, have this effect can be based on rule 5(1) of Sched 8 and / or s 22(2) of the Act. Rule 5(1) has already been set out; s 22(2) states:

Nothing in Schedule 8 affects the operation of any enactment or rule of law under which a court may decline to exercise jurisdiction because of the prorogation by parties of the jurisdiction of another court.

Whether or not rule 5(1) has any application in the case of an

agreement to prorogate the jurisdiction of a court outside the contracting states, s 22(2) would appear to preserve the pre-existing law in this area which is briefly considered below. But in view of the precedence which the Conventions take over Sched 8,⁹³ if the Scottish courts have jurisdiction in an action in terms of the general rules of the Conventions (perhaps supplemented by Sched 4), and if it is the case that, in terms of the Conventions, a prorogation agreement in favour of a court of a non-contracting state does not exclude the jurisdiction of the courts of the contracting states, rule 5 and s 22(2) almost certainly cannot have the effect of by themselves preventing the action going ahead in the Scottish courts on account of the purported prorogation of the jurisdiction of the Uruguay court.⁹⁴

As is implied in the preceding paragraph, rule 5(1), like art 17 para one of the Conventions, speaks of "exclusive jurisdiction". But in view of the priority of Sched 4 over Sched 8,⁹⁵ if Sched 4, but not the Conventions, is also relevant in an action, it may well be that rule 5 cannot exclude the jurisdiction of Scottish courts not agreed upon by the parties. So if the situation is the converse of that outlined above, and there is a prorogation agreement in favour of the English High Court, but the defender is domiciled in Scotland, the Court of Session as well as the English High Court would appear to have jurisdiction.

These remarks are designed primarily to show that in certain circumstances a prorogation agreement will have the effect of excluding the jurisdiction of courts not agreed upon; in other circumstances it will not have this effect. In some situations the

precise effect of the prorogation agreement is clear; in many others, on account of a lack of judicial or other authoritative dicta, it is not. It is submitted that at present it is not possible with certainty to list all the sets of circumstances in which a prorogation agreement will have the effect of excluding the jurisdiction of all Scottish courts not agreed upon. So the best course for those concerned with the drafting of rules of court is to assume that with regard to all types of category (i) and category (ii) actions - even exclusive jurisdiction ones - there may be a prorogation agreement in favour of one or more courts which has the effect of excluding the jurisdiction of all other courts. It should be left to the judge in the particular case to decide what the precise effect of any prorogation agreement is.

Is it therefore the case that a pursuer in a category (i) or category (ii) action should be required to make averments in his initial writ about the existence or non-existence of a prorogation agreement? It is submitted that the correct answer to this question is Yes. For the question of whether or not a valid prorogation agreement in favour of another court exists is one which, it has been argued, should be regarded as potentially relevant to jurisdiction in all category (i) and category (ii) actions. And in view of the onerous duty which the court may very well have to investigate the question of jurisdiction in all category (i) and category (ii) actions in which the defender does not enter appearance, it is the view of the writer that it is appropriate for a pursuer to be asked to assist the court in any such action by making it aware of anything which might be a relevant prorogation agreement.

Even if, as now seems likely, it is the case that, in an exclusive jurisdiction action, a prorogation agreement cannot prevent any of the courts of the relevant locus from exercising jurisdiction, there is a strong argument that such actions should not be excluded from the scope of any rule of court concerning averments relating to prorogation agreements. For, in addition to the uncertainties surrounding art 17 of the Conventions and rule 5 of Sched 8, the wording of at least some of the provisions of art 16 and rule 4 leaves room for doubt as to the full range of actions to which they apply. Of art 16(1), Anton states⁹⁶ that "its domain of application remains unclear". The European Court has already been called upon three times to clarify its scope.⁹⁷ Anton also points out problems concerning the interpretation of art 16(2).⁹⁸ A judge who is in possession of all the facts which may be relevant to jurisdiction is clearly in the best position to ascertain whether or not the court does in fact have jurisdiction. Moreover as will be seen in the next chapter, there may be a duty on the court to consider whether there is an identical action taking place elsewhere, and to decline jurisdiction if there is such an action. And the subject matter of an identical action might fall within the scope of art 16. And if a pursuer is required to make an averment concerning the possibility of a prorogation agreement, the court is, it is submitted, more likely to become aware of the real possibility of an identical action elsewhere.

It is sometimes suggested that prorogation, or rather the lack of it, is a secondary or subsidiary matter, and does not merit as much attention as do, for example, the rules of special jurisdiction in art 5 and rule 2. But it is submitted that a distinction between

primary and secondary matters cannot be drawn. Either a court has jurisdiction or it hasn't. And it is quite clear that if there is a valid prorogation agreement, within the contracting states courts not agreed upon do not have jurisdiction. Like art 16, art 17 para one uses the words "exclusive jurisdiction". The lack of jurisdiction in terms of the Convention on the part of the Scottish courts to entertain an action relating to the ownership of land in Berlin is not in doubt; nor should there be any doubt about their lack of jurisdiction to entertain an action relating to a matter which has been the subject of a prorogation agreement in favour of the Berlin courts.

It may be pointed out that art 19 contains a special rule relating to the courts' duty to declare their lack of jurisdiction in "art 16" actions wrongly brought before them. The explanation for this provision not referring to art 17 as well as to art 16 is that art 20 para one is perfectly adequate in the art 17 context. Unlike art 20 para one, art 19 does not cease to operate when the defender enters appearance. For it would not be appropriate for parties to be allowed to litigate in Scotland about the ownership of land in Berlin. As Jenard puts it,⁹⁹ "the exclusive jurisdictions [in art 16] are conceived to be matters of public policy". But there would be no justification in preventing them litigating in Scotland just because they had previously agreed to litigate only in Berlin.

In case further authority on the "negative" effect of a prorogation agreement is required, two short passages in Droz's commentary will be quoted. The first¹⁰⁰ is this:

L'article 17 a....pour effet de donner au tribunal élu une compétence exclusive. Il en résulte nécessairement que tout autre tribunal que le tribunal ou les tribunaux élus est incompétent. [Droz's emphasis]

Of course, "être compétent" should be translated as "to have jurisdiction". The second passage¹⁰¹ is even more to the point. It forms part of the section on art 20 para one and states that if a party to a prorogation agreement in favour of the court in Brussels is domiciled in a contracting state, and in an attempt to obtain a decree against him

le demandeur saisisse le tribunal de Paris, en violation de la prorogation de for en faveur du tribunal de Bruxelles, le juge français devra se déclarer d'office incompétent en cas de défaut.

It is interesting to note that, in justifying the "negative" aspect of art 17 para one, Jenard states that it¹⁰²

is essential to avoid different courts from [sic] being properly seised of the matter and giving conflicting or at least differing judgments.

But, some practitioners may still ask, must the defender be required to aver, if this is the case, that he is unaware of the existence of anything which may be a prorogation agreement? It can be argued that, on account of the wording of the present rule, if there is no averment concerning the existence of a prorogation agreement, the court can assume that there is no such agreement or, at any rate, that the pursuer knows of no such agreement. This would appear to be the view of Sheriff Principal Taylor. St Michael Financial Services v Michie¹⁰³ was a summary cause, but he would no doubt have made it clear if he felt that the approach in ordinary causes should be any different from that in summary causes. He undoubtedly considered that the equivalent summary cause rule (as he interpreted it) was

adequate; a rule requiring negative averments to be made in appropriate cases would "simply [add] unnecessarily to the formalities of the writ".¹⁰⁴

Then in Central Farmers v Watson Sheriff Principal Taylor in effect held that, even at the stage of granting decree in absence, a sheriff could deduce from the lack of either an averment on the question of prorogation or any other "grounds for suspecting" that there might have been prorogation in favour of another court, that no relevant prorogation agreement did in fact exist. In his words, "[i]f....the court has no reason to suppose....that jurisdiction may have been excluded by prorogation....there is nothing to trigger paragraph 8, and it is the sheriff's duty to grant decree in absence".¹⁰⁵¹⁰⁶

Sheriff Principal Taylor's approach is in line with that of the Maxwell Report. The Report states that¹⁰⁷

[o]ne of the points which the court will have to consider....is whether another court has been prorogated by an agreement valid in accordance with Article 17.....We think that the most which can be done is to require the pursuer, by rules of court, where he has reason to believe that there is or may be such an agreement, to say so in the initiating writ.

But it is nevertheless the writer's view that, on account of the somewhat onerous duty imposed on the court by art 20 para one of the Conventions, and quite possibly also by art 20 para one of Sched 4 and by rule 8 of Sched 8, it is perfectly reasonable for the pursuer in a category (i) or category (ii) action to be required by the rules of court to assist the court by setting out, in the initial writ, whether or not there exists, to the best of his knowledge, anything which may constitute a prorogation agreement.

The present writer has already argued the case for the statements on prorogation to form part of the initial writ rather than be introduced at a later stage, and he believes that, in the event of the defender failing to enter appearance, a negative averment is of significant assistance to the court in the fulfilling of its duty to consider the question of jurisdiction. Of course some practitioners may as a matter of course, without giving adequate attention to the matter, aver that no relevant prorogation agreement exists. But it is submitted that if he is required to make an averment, positive or negative, the average practitioner is much more likely to address his mind to the question of prorogation and as a result be of real assistance to the court in the fulfilling of its duty to verify jurisdiction in the event of the defender failing to enter appearance. And it is clearly good practice for a practitioner, before raising an action, to look into all the elements of jurisdiction. When he ascertains that there is no relevant prorogation agreement, stating this from the outset in the initial writ is surely preferable to simply making a written note which may get lost in the file or elsewhere.

Moreover, as the lack of a prorogation agreement in favour of another court, like the defender's domicile being in the territory of the court, or the accident having taken place in the territory of the court, is one of the elements inherent in the court's jurisdiction, it would be illogical for it not to be the subject of an averment. Of course it can be argued that if the lack of a prorogation agreement is one of the elements inherent in jurisdiction, averring this matter is required by the present rule 3(4) and a special rule is

unnecessary. The best answer to this point is probably that unless there is an Inner House decision on the question of averring the lack of a prorogation agreement, it is only by means of a further rule of court that the correct approach can be introduced and maintained throughout the sheriff courts of Scotland.

108

Black has stated in public that, in his schrieval capacity, he would not be prepared - or at any rate he would be reluctant - to grant decree in absence in an action in which there had been neither an averment in the initial writ nor a submission on the pursuer's behalf relating to the question of prorogation. He has also given advice to practitioners that wherever possible they should make, in their initial writs, a positive or negative averment concerning prorogation. A reported decision by him would of course be in conflict with those of Sheriff Principal Taylor. But it would be giving judicial approval to an approach along the same lines as that favoured by the present writer, and it might well have the effect of encouraging the Rules Council once again to look into the whole matter of averments of jurisdiction.

Before concluding this section on prorogation agreements with a new draft rule of court, something should for completeness be said about category (iii) actions. In this context the new requirement - assuming it exists - of a prorogation agreement averment seems inappropriate. For category (iii) actions are outside the subject matter scope of the Act as a whole and so the rules of prorogation relating to them cannot have been affected by the Act. And in any event it does not appear to have been held that at common law the mere fact of prorogating the jurisdiction of one court had the effect

of excluding the jurisdiction of all other courts.¹⁰⁹

It is submitted that Elderslie Steamship Co v Burrell & Son,¹¹⁰ cited by Duncan & Dykes, did not in fact decide this point.¹¹¹ It is preferable to regard the decision in that case as concerning forum non conveniens on account of an action having previously been legitimately raised elsewhere. And at common law an agreement by the parties to exclude a court's jurisdiction would probably be competent but the pursuer was not required as a matter of course to aver the existence or non-existence of such an agreement. It was left to the defender to raise the issue. But even if the writer's interpretation of Elderslie Steamship Co is wrong, insofar as category (iii) actions are concerned there would not appear to be any good reason for rule 3(2) to replace the traditional practice of leaving the question of prorogation (of another court) to be raised by the defender.

Finally, it is suggested that it would be appropriate for rule 3(2) to read:

In any cause which, by reason of its subject matter, falls within the scope of the 1968 Brussels Convention and 1988 Lugano Convention, and/or the rules of jurisdiction in Schedule 8 to the Civil Jurisdiction and Judgments Act 1982, whether or not jurisdiction is determined by the provisions of either Convention and/or Schedule 8,¹¹² the initial writ shall contain an averment about whether or not there may be in existence, as far as the pursuer is aware, any agreement prorogating jurisdiction over the subject matter of the cause to another court.

5 Identical actions and ordinary causes

The provisions of the Conventions which are concerned with identical actions are those of arts 21 and 23. The wording of art 21 of the first version of the Brussels Convention was amended by the 1989 Accession Convention. The wording in the new version of the Brussels Convention, and that in the Lugano Convention, is as follows:

Art 21

Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Art 23

Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

There are no equivalent provisions in Sched 4 or Sched 8. It is of course on account of the words "shall decline jurisdiction" in both art 21 para two and art 23 that it can be argued that, for the purposes of the rules of court, identical actions should in effect be equated with prorogation agreements. And, it should be noted, art 21 para one provides that in certain circumstances a court "shall of its own motion stay its proceedings"; here too courts are being given a requirement, not a discretion.

It is worth mentioning that art 22, which is concerned with actions which are related to each other without being identical, does not contain the words "shall decline jurisdiction". Instead, it merely

provides that in certain circumstances where there are related actions, a court other than the court first seised "may....stay its proceedings" or "may....decline jurisdiction". The court is being given a discretion to stay the proceedings or decline jurisdiction, and has no duty to act ex proprio motu and establish whether or not there is a related action. So there is clearly no need for a pursuer to be required to make averments relating to the possibility of the existence of a related action; it can quite safely be left to the defender to raise this matter. And, it should be said, no rule contained in the Act itself or elsewhere imposes on Scottish courts the duty to investigate ex proprio motu the possibility of a related action taking place elsewhere.

The argument that identical actions can for present purposes be equated with prorogation agreements is commonly made. If a positive or negative averment must be made in each initial writ relating to one of these matters, it is said, such averments must be made in relation to both. If positive averments alone are required on one matter, only positive averments are required on both. Article 20 para one of the Conventions imposes a duty on courts with regard to jurisdiction, the argument goes, and the lack of a previously brought identical action in a court of another contracting state, just like the lack of a prorogation agreement in favour of another court, is a factor essential to the court where the action has been brought having jurisdiction. If, in the event of a defender not entering appearance, affidavits or oral evidence are required in relation to one matter, they are required in relation to both.

It is submitted that if one result of the existence of a previously

brought identical action in a court of another contracting state is that a Scottish court does not - cannot - have jurisdiction, then this argument is correct. On account of the interpretation of art 20 para one of the Conventions which he has set out above, and his application of this provision with regard to prorogation agreements, the present writer would argue that, in the case of category (i) actions, each pursuer should be required to make a positive or negative averment about identical actions as well as about prorogation agreements. The first question to be considered is therefore: Does the existence of a previously brought action in one of the contracting states, at any rate where the jurisdiction of the court seised has been established, have the effect of preventing the courts of all the other contracting states from having jurisdiction in an action with the same subject matter and between the same parties? Loosely speaking, can the effect of art 21 be equated with that of art 16 or art 17?

There have not been any decisions of the European Court on this point, and it does not yet appear to have been discussed in a Scottish or English court.¹¹³ It seems appropriate to begin by considering the relevant words of the Conventions themselves. Can a distinction be made? Article 16 provides that certain courts "shall have exclusive jurisdiction", and in art 17 we read that a particular court or courts "shall have exclusive jurisdiction". But of course in art 21 the form of words used is different: "shall decline jurisdiction". It is appreciated that an international Convention cannot be interpreted in the same way as a British statute, and differences between particular forms of words may be of less

significance, but it does nevertheless seem that it might not be unreasonable to make a distinction in this area between arts 16 and 17 on the one hand and art 21 on the other.

If an action concerned the ownership of land in France, or there was a prorogation agreement in favour of a French court, on account of art 16 or art 17 a Scottish court would not have jurisdiction; if there already was an identical action in France¹¹⁴, on account of art 21 it would be required to decline jurisdiction. Is the distinction here more superficial than real? It may not be. As stated above, in art 22, concerning related actions, the words "may decline jurisdiction" are used. In this context, in "declining jurisdiction" the court is clearly simply declining to entertain an action although it does have jurisdiction. It is interesting to look at other language versions of the Conventions.

In the French version - and of course European Community agreements such as the Brussels Convention are drafted in French - the words "sont seuls compétents" are used in arts 16 and 17, but in art 21 we read "se dessaisit". So a difference can clearly be seen here; art 21 does not use the word "compétent" or "incompétent". "[D]essaisir" would usually be translated as "to remove", and "se dessaisir" as "to decline". And in art 22 it is stated in the French version that the second court seised "peut....se dessaisir" - "may....decline jurisdiction" in the English version. What those who drafted the Conventions were wanting to say in the art 21 context may very well have been that the second court seised should "decline to hear the case" / "decline to entertain the action". But this form of words was perhaps considered to be too cumbersome, and as a result "decline

jurisdiction" was used instead in the English version.

The approach of the Italian, Spanish and Portuguese versions of the Conventions is similar to that of the French version. At first sight the German version appears to be of value to those who argue that there is no real distinction between not having jurisdiction and declining jurisdiction. It has the words "ausschließlich zuständig" in arts 16 and 17, and "erklärt sich....für unzuständig" in art 21. But it is submitted that the use of these German forms of words cannot in fact assist those who argue that, where art 21 is applicable, the court lacks jurisdiction. For "unzuständig", perhaps curiously, appears to be used loosely, or in different contexts, in German. In art 22 we read in the German version that the court "kann....für unzuständig erklären". So the question can be described as one of "Zuständigkeit" where it clearly is whether the court should exercise the jurisdiction which it undoubtedly has.

Of course the practical effect of a court declaring that it has no jurisdiction will generally be the same as that of a court declaring that, although it has jurisdiction, it cannot allow the action before it to proceed. But the steps which the court must take to verify its jurisdiction before making one declaration may be different from those which it must take before making the other. If, on account of art 21, a court seised second does not - cannot - have jurisdiction, in view of art 20 para one (as interpreted by Jenard and Droz) where the defender does not enter appearance a court must go to some lengths to determine whether or not there is a previously brought identical action elsewhere. But if, on account of art 21, a court seised second which does have jurisdiction in terms of the general

rules simply cannot exercise that jurisdiction, the question then arises of whether art 21 imposes a duty to investigate at some length the matter of identical actions, a duty similar to the art 20 para one duty to investigate the matters, including prorogation, which relate to jurisdiction.

115

Much assistance is derived from the Jenard Report. It makes the point that

[b]y virtue of Article 21, the courts of a Contracting State must decline jurisdiction, if necessary of their own motion, where proceedings involving the same cause of action and between the same parties are already pending in a court of another State.

116

It then goes on to state that

[a] court will not always have to examine of its own motion whether the same proceedings are pending in the courts of another country, but only when the circumstances are such as to lead the court to believe that this may be the case.

117

In the context of art 20 para one, Jenard stated simply that "the court must itself ensure that the plaintiff proves that it has international jurisdiction". But he is undoubtedly implying that in the art 21 context the court's duty to verify matters, if it exists at all, is not nearly as onerous. Of course the art 21 duty, unlike the art 20 para one duty, exists whether or not the defender has entered appearance. It can safely be assumed from the context that, in his statement that a court will not always have to examine whether there is an identical action elsewhere, Jenard is not referring purely to situations where the defender has entered appearance. There is also of course an implication in Jenard's comments that art 21 para two is concerned with the exercise of jurisdiction rather than with jurisdiction itself. For he is saying in effect that the onerous

art 20 para one duty does not involve the issue of identical actions - which on account of its terms it would have done if art 21 para two had been concerned with jurisdiction itself.

It should perhaps be stated that for present purposes the amendments made to the original version of art 21 by the 1989 Accession Convention are immaterial; the expression "shall....decline jurisdiction" was used in the first version of the Convention. So the comments of Jenard - and Droz - cannot be regarded as out of date.

In his passages on art 20 para one, Droz makes no reference to art 21. And it is clear from both the layout of his book and his comments on art 21 that he does not consider the question of the existence of an identical action to be a question of jurisdiction, bringing art 20 para one into play. Nor does he consider the court's duty under art 21 to be as onerous as that imposed by art 20 para one. In the part of his book devoted specifically to civil jurisdiction,¹¹⁸ the first section is concerned with the rules of jurisdiction themselves, and the second section with the "mise en jeu des règles de compétence". The provisions of arts 16 and 17, and the effects of the "negative" rule in art 4, are all considered in the first section, but the discussion of art 21 is in the second section. In discussing art 21,¹¹⁹ he states that

[1]e juge qui, au cours de la procédure, apprend que le tribunal d'un autre Etat contractant est déjà saisi de l'affaire pourra donc à tout moment se dessaisir même si les parties ne le sollicitent point....Même s'il n'est plus temps pour une partie de soulever l'exception, il est fort probable que le juge, mis au courant de l'existence d'une instance poursuivie à l'étranger, n'hésitera pas à se dessaisir si les conditions de l'exception sont réunies.

On account of the obligation imposed by art 21, in the second line of

the quotation "devra" might have been a more appropriate word than "pourra". But what is clear is that he, like Jenard, regards art 21 para two as being concerned with the declining to hear cases rather than with the lacking of jurisdiction. And he seems to be thinking in terms of courts, in one way or another without investigation on their part, becoming aware of the existence of identical actions. Moreover, on account of his earlier comments on art 20 para one, we can assume that, had he regarded the duty imposed by art 21 para two as requiring courts to investigate matters for themselves, he would have made this clear.

In art 21 attention usually focuses on para two, but it should be made clear that Jenard and Droz very much appear to be rejecting the notion that courts should investigate matters for themselves so as to satisfy the provisions of either para two or para one. If a Scottish judge becomes aware of the existence of a previously brought identical action in another contracting state, with the question of the jurisdiction of the foreign court about to be considered by the foreign judge, he should sist the Scottish action. But if he is not aware of the existence of the foreign action, and so does not sist the proceedings in Scotland, he is not failing to carry out his duty. His duty, in other words, only arises when he becomes aware of the existence of the identical action.

120

The justification which Jenard gives for art 21 is this:

As there may be several concurrent international jurisdictions, and the courts of different States may properly be seised of a matter (see in particular Articles 2 and 5), it appeared to be necessary to regulate the question of lis pendens.....[T]his will facilitate the proper administration of justice within the Community.

Droz states that

la Convention ne veut pas mettre les Etats membres dans la pénible situation d'avoir à reconnaître et exécuter des jugements contradictoires, ou simplement non identiques, émanant de plusieurs autres Etats contractants.

In the writer's opinion this is a perfectly adequate explanation for having a rule requiring courts to refuse ex proprio motu to entertain an action if an identical action has been brought in another contracting state. It will be remembered that an explanation along these lines was given for the jurisdiction conferred by a prorogation agreement being exclusive. One might ask whether a good case can be made for requiring judges actively to guard against contradictory judgments being given in actions one of which has resulted from a prorogation agreement, but not for requiring them actively to guard against such judgments in actions which have both been brought in courts with jurisdiction in terms of the general rules of the Conventions.

It is submitted that a case can, in fact, be made for the identical action rule to impose on the courts a more onerous duty of investigation than that imposed on them by the rule in art 20 para one laying down the general duty to verify jurisdiction. A defender can appear and argue "no jurisdiction". And in terms of art 20 paras two and three, if he does not appear the court must, loosely speaking, check that he has had a proper opportunity to appear and defend the action. But for the reasons given by Jenard and Droz, whether or not the defender appears, and whether or not he raises the matter, the court should not let the proceedings continue if it is aware of identical proceedings which have previously been brought

elsewhere. However, on account of the wording and interpretation in this context of art 21 paras one and two on the one hand, and that of arts 17 and 20 para one on the other, there seems little doubt that the duty imposed on courts by art 21 is not as onerous as that imposed by art 20 para one.

It is worth pointing out that art 21 is only concerned with the situation where the previously brought identical action is in a court of another contracting state. It is not concerned with an identical action in the state of the forum or with identical actions in a contracting state and in a non-contracting state. If the identical action is in another Scottish court, an English court or an American court, the appropriate course for a Scottish court to take is determined by Scots law - modified, of course, by any of the general rules of the Conventions or Sched 4 which are of relevance.¹²² It should also be noted that for the purposes of art 21 the domicile of the defender and the grounds of jurisdiction of the courts concerned are immaterial. If an action is being brought against an American, and jurisdiction in the Scottish court and in the court of the other contracting state is being based on rules of exorbitant jurisdiction, the Scottish action cannot go ahead any more than it could have done if the action had been against a German and jurisdiction was based on art 5(1) of the Conventions.¹²³

A further point worth emphasising is that, as is clear from sentences in Droz's book quoted above,¹²⁴ the court's duty under art 21 exists whether or not the defender has entered appearance; it exists in other words until decree is granted. As a general rule art 18 provides a court with jurisdiction if the defender appears. But it

does not take away the duty of the court to decline its jurisdiction if it becomes aware at a late stage in the proceedings of a previously brought identical action in a court of another contracting state.¹²⁵

At the beginning of this chapter the writer set out the terms of art 23. It simply refers to "actions", not to "actions involving the same cause of action and between the same parties". But on account of its terms it, like art 21, must be concerned with identical actions. For present purposes the difference between art 23 and art 21 is that art 23 is limited in scope to actions where there is exclusive jurisdiction. Article 21, on the other hand, is general in its application, though of course it can be argued that it is by implication inapplicable in the context of exclusive jurisdiction.

The need for art 23 is not particularly clear. Like art 21 it uses the expression "shall decline jurisdiction". So in the view of the writer it can safely be assumed that it does not impose on courts a duty to investigate matters greater than that imposed by art 21. But it was probably felt that if a court claimed exclusive jurisdiction in an action, it would be most reluctant to decline to hear the action on account of another court having been seised first. So art 23 was inserted to "reinforce" art 21 in the context of exclusive jurisdiction.¹²⁶ Article 23 does not state explicitly that it is only concerned with actions in different contracting states, but as the Conventions are not, at least as a general rule, concerned with jurisdiction outside the contracting states, or with problems of jurisdiction internal to any one state, it is probably only of relevance where the actions have been brought in different

¹²⁷
contracting states.

In what circumstances could a "conflict" to be determined by means of art 23 arise? The example most often given is of a situation where, on account of differing national rules relating to the seat of companies, the courts of two states have jurisdiction in terms of art ¹²⁸ 16(2). Secondly, it is conceivable that an action might fall within two of the art 16 categories. Kaye gives ¹²⁹ the example of an action to have declared void as ultra vires a transfer of land from a company to its directors; it could be argued that both art 16(1) and art 16(2) are relevant here.

Thirdly, the approach of art 16 is, of course, to give exclusive jurisdiction to the courts of a contracting state as a whole; it is left to the national law to determine which courts within the state should have jurisdiction. It is not clear whether art 23 would be of relevance in the context of a duplicity of actions within one state; the Conventions are, as stated above, at least as a general rule, concerned with intra-Community, rather than with purely internal, questions of jurisdiction. Finally here, in terms of art 17 the jurisdiction of more than one court may be prorogated; on account of the words "exclusive jurisdiction" in art 17, in this context art 23 might have a role to play. If an agreement to prorogate the courts of two contracting states was valid, and an action was brought in one, art 23 would probably be applicable in the event of an action then being brought in the other. The number of occasions on which art 23 will be invoked is undoubtedly extremely small, but the precise extent of its scope is far from clear.

Having considered the effects of arts 21 and 23, it is now appropriate to return to the question of whether a rule of court should require pursuers to make averments relating to the possibility of identical actions and, if so, what the precise scope of the rule should be. Considering the writer's three categories of actions in the order (iii), (ii), (i), it can first of all be said that any rule should not extend to category (iii) actions. These actions are outside the scope of the Act as a whole and the common law approach to identical actions, involving the pleas of forum non conveniens and lis alibi pendens, cannot have been affected by the Act.¹³⁰

So far as category (ii) actions are concerned, they too should be outside the scope of any new rule. For Sched 8 does not contain an equivalent of arts 21 and 23. As a result, in the context of actions outside the subject matter scope of the Conventions, the common law rules are still applicable. A court need not investigate for itself the possibility of an identical action; it can leave it to the defender to plead forum non conveniens or lis alibi pendens. Section 49 of the Act, it must be remembered, makes it clear that these pleas are still available in the category (ii) context; s 22(1) contains a similar provision relating to the plea of forum non conveniens alone.

Turning to category (i) actions, is it the case that, on account of the wording of arts 21 and 23 and its interpretation by Jenard and Droz, the courts can in practice leave it to defenders to raise the matter of a previously brought identical action in a court of another contracting state? It is submitted that there is a strong argument that the correct answer is Yes, and that as a result the rules of court need not refer to identical actions. But it is the view of the

present writer that, on balance, a rule concerning identical actions is appropriate. And, for the reasons given above in the context of averments relating to prorogation agreements, the rule should require an averment, positive or negative, to be made in each initial writ. The writer must justify his now effectively equating identical actions with prorogation agreements. But there is no need for there to be repeated here his case for the necessary statements to be included in the initial writ rather than simply in the minute for decree, and for the rule of court to require negative as well as positive averments. If identical actions can for present purposes be equated with prorogation agreements, what was said in the context of prorogation agreements is valid here too.

It is accepted that it is almost certainly the case that identical actions are concerned with the exercise of jurisdiction rather than with jurisdiction itself, and that art 20 para one is of no relevance in this context. But in terms of art 21 the court has at least in principle a duty, not a mere discretion, to decline to entertain proceedings if an identical action has previously been brought in another contracting state. The best authority we have at present, that of the Jenard Report,¹³¹ does indeed suggest that there need not be a requirement for an averment on the subject of identical actions to form part of each initial writ. But the importance of conflicting judgments not being given in courts of different contracting states is clear, and it is conceivable that the European Court would give a ruling at variance with the dicta of Jenard on the courts' duty of investigation in the art 21 context. On account of the importance of the matter of identical actions, it does not seem to be expecting too much of those representing pursuers to require them to include, in

each of their initial writs, an averment on the subject.

Jenard, it must be remembered, was writing when the contracting states were all Continental states with an inquisitorial system of civil procedure. As referred to above, in these states the judge is much more closely involved in the proceedings than he is in an action in the British Isles; he is therefore much more likely to become aware of the existence of an identical action elsewhere without a formal investigation of the matter. Had Jenard been writing in the context of the United Kingdom's accession to the Convention, his comments on the extent of the court's duty under art 21 might, it can be argued, have been somewhat different. The point is not referred to in the Jenard and Möller Report on the Lugano Convention. But this Report is primarily concerned with the features of the Lugano Convention which are not reflections of the Brussels Convention as amended in 1978, and with the European Court case law on the Brussels Convention. It is not a further commentary on the Conventions as a whole.

The rule of court ought not, it is submitted, to require the pursuer's averment merely to concern identical actions which have already been brought. It is indeed the case that it is only if an identical action is already taking place that the Scottish proceedings cannot go ahead. But as it may not be easy for the pursuer to establish precisely what stage matters have reached in another contracting state, and the question of exactly what is meant by the bringing of proceedings is not always free from difficulty,¹³² the averment should make reference to proceedings which the pursuer understands might be begun elsewhere. The court can then take

appropriate steps to establish whether or not an identical action was as a matter of law previously raised elsewhere.

One question remains in this chapter. Should the rule of court relate to identical actions in any other court, or only to those in courts of other contracting states? Article 21 is purely concerned with courts in other contracting states, but as is mentioned above the scope of art 23 may not be restricted in this way. Because art 23 is limited to exclusive jurisdiction actions, and because a situation in which art 23 is relevant will be very rare, there is a temptation to suggest that it should be ignored and that the rule should simply concern identical actions in other contracting states. But if the existence of an identical action in any other court is regarded as potentially relevant in any category (i) action, this will actually enable a shorter averment to be made by the pursuer in the vast majority of actions. Averring that there are no identical actions elsewhere is simpler than averring that there are no identical actions in any other Brussels Convention or Lugano Convention contracting state. And informing the court of an identical action which it considers to be irrelevant is preferable to not informing it of one which is relevant.

To conclude, it is suggested that the present rule 3(3) be amended to read:

In any cause which, by reason of its subject matter, falls within the scope of the 1968 Brussels Convention and 1988 Lugano Convention, whether or not jurisdiction is determined by the provisions of either Convention, the initial writ shall contain an averment about whether

or not there may be, as far as the pursuer is aware, at the date of the bringing of the action or thereafter, pending before another court a cause involving the same cause of action and between the same parties as those named in the initial writ.

6 The domicile of the defender, the giving of adequate notice to the defender and rules of court

There was set out in Chapter 2 of this Part the Sheriff Court Ordinary Cause Rules, rule 3(4)(a), which existed from 1 January 1987 till 30 November 1988. It is generally considered that, as a result of the deletion of this rule, the domicile of the defender in terms of the Conventions and Act need now only be averred where the jurisdiction of the court is being based on the defender being domiciled in the sheriffdom. This chapter will consider the question of whether a rule ought to exist requiring an averment of the defender's domicile to be made in all civil actions, or at any rate in a larger category than that of those where jurisdiction is being based on the defender being domiciled in the sheriffdom.

It is appropriate briefly to consider the old rule 3(4)(a). The only reported case on the rule is Burmy v White,¹³³ referred to above. In this case the Sheriff Principal of Glasgow and Strathkelvin held that, notwithstanding the terms of rule 3(4)(a), in an action for payment of rent and an order for ejection it was unnecessary for the defender's domicile to be averred. If the property concerned was in the sheriffdom, the court had exclusive jurisdiction on account of Sched 8 rule 4(1)(a) of the Act. Sheriff Principal Macleod¹³⁴ held that "one must...regard [rule 3(4)(a)] as applicable only to actions in which...the domicile of the defender is a matter relevant to the action".

It is indeed pointless for the defender's domicile in terms of the Conventions and Act to be required to be averred where it is of no relevance to either the jurisdiction of the court or the progress of

the action. But it is the view of the present writer that the rule may very well, however unfortunately, have required such an averment to be made in all civil actions. There were no words in the rule which indicated that all civil actions were not included in its scope, and it had no ambiguity requiring the court to consider how it ought to be interpreted. The writer's comments on the scope of application of the prorogation averment and identical action rules, and the dicta of Lord Atkinson quoted by Lord Scarman in Stock v Frank Jones (Tipton), appear to be relevant in the context of the old rule 3(4)(a) too. There is no need for them to be repeated here, and as the rule has now been deleted the matter is of limited importance.

There are of course numerous types of actions which are outside the scope of the Act as a whole - category (iii) actions. The domicile of the defender in terms of the Conventions and Act cannot affect the jurisdiction of the court or the progress of the action if the subject matter does not concern a civil or commercial matter in terms of art 1 of the Conventions and does not fall within the scope of Sched 8 to the Act. If any kind of domicile is relevant in such an action, it is domicile at common law. It is therefore quite pointless for a rule of court to require the defender's domicile in terms of the Conventions and Act to be averred in a category (iii) action.

Nor does there appear to be any justification for requiring the defender's domicile in terms of the Conventions and Act to be averred in every action which by reason of its subject matter falls outside the scope of the Conventions but inside the scope of the Sched 8 rules - category (ii) actions. The kind of domicile which may be relevant to jurisdiction in such actions is indeed domicile in terms

of the Conventions and Act. But in such actions the defender's domicile is only of relevance if it is the ground of jurisdiction of the court. And if it is the ground of jurisdiction it must of course be averred in order to comply with the requirement which has been retained in Ordinary Cause Rules, rule 3(4).¹³⁷

It should be said that in contrast to the Conventions, which very loosely speaking have one set of rules of jurisdiction for persons domiciled in the contracting states and another set for those domiciled outside them, as a general rule Sched 8 does not discriminate between persons domiciled in Scotland, persons domiciled elsewhere in the United Kingdom, persons domiciled elsewhere in the contracting states and persons domiciled outside the contracting states. And rule 8 of Sched 8, which is based on art 20 para one of the Conventions, makes no reference to domicile. No rule of Sched 8 is based on art 20 paras two and three of the Conventions. So if an action concerns the interpretation of a will, the defender's domicile will only be of relevance if jurisdiction is being based on his being domiciled in the territory of the court.

In Sched 8, rule 2(8) states that

....a person may....be sued-
where he is not domiciled in the United Kingdom, in the courts for any place where-
(a) any moveable property belonging to him has been arrested; or
(b) any immoveable property in which he has any beneficial interest is situated.

If jurisdiction is being based on either limb of this rule, it is clearly appropriate for there to be an averment relating to the domicile of the defender as well as an averment concerning the

location of the property in question. And, as a defender may be domiciled in more than one place, an averment that, for example, the defender is domiciled in Nicaragua is insufficient; it must be averred that he is not domiciled in the United Kingdom. It seems unnecessary to have a rule of court specifically concerning the averring of the domicile of the defender in category (ii) actions where jurisdiction is based on rule 2(8). Averring domicile in such actions is, it can easily be argued, required in any event by the present rule 3(4). And, perhaps more importantly, the number of actions where use is made of rule 2(8) is rather small; any failure to make the appropriate averments can result in a shrieval decision.

The remaining question then is: Should the pursuer be required to aver the defender's domicile in terms of the Conventions and Act in all actions which fall within the subject matter scope of the Conventions - category (i) actions? In other words, should a pursuer be required to aver the defender's domicile where he is basing jurisdiction on something other than the defender's domicile in the territory of the court? (The present rule 3(4) requires him to do so where jurisdiction is being based on the defender's domicile in the territory of the court.) If the answer is Yes, must each domicile be averred in the event of the defender having more than one? And, if there is more than one defender, must the domicile(s) of each of them be averred? It was unfortunate that the drafters of rule 3(4)(a) took no account of the possibilities of multiple domiciles and multiple defenders.

The discussion here focuses on art 20 of the Conventions. It is appropriate first to consider para one, and then to consider paras

two and three. In view of its importance it is useful to set out para one again:

Where a defendant domiciled in one Contracting State is sued in a court of another Contracting State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Convention.

As stated in Chapter 3 of this Part, in art 20 para one of Sched 4 "Contracting State" is replaced by "part of the United Kingdom", and "Convention" by "Title". And then of course no reference to the domicile of the defender is made in the equivalent provision of Sched 138
8.

In Chapter 3 the writer considered the duty imposed on the Scottish courts by these provisions. He stated that the implication of certain sentences in the Jenard Report is that, where an action falls within the subject matter scope of the Conventions and the defender fails to enter an appearance, the court has a somewhat onerous duty. It must investigate for itself at least certain matters relating to jurisdiction. If the defender is domiciled in another contracting state, it must ascertain whether it has jurisdiction in terms of the Convention. If the defender is domiciled in another United Kingdom law district, on account of art 20 para one of Sched 4 the court may very well have a similar duty to investigate the whole matter of jurisdiction.

The court is clearly in a much better position to fulfil its duty if, with regard to all the various factors relevant to jurisdiction, it has been put in the picture by the pursuer as much as possible right at the beginning of the action. The arguments put forward by the

writer for statements about prorogation agreements being required to be made in the initial writ rather than in a subsequent minute for decree appear to him to be at least as valid in the context of statements about the defender's domicile. In the Maxwell Report it is

139
recommended that

[i]t should be presumed in practice, where the defender's address stated in the initiating writ is in Scotland, that the defender is domiciled here and that accordingly there is jurisdiction.

But an individual might very well have an address in Scotland without being domiciled there in terms of s 41 of the Act, and on account of the importance of the ascertaining of the defender's domicile the present writer does not consider the Maxwell Report's recommendation to be at all satisfactory.

As was stated above, it is not at present clear if rule 8 of Sched 8 imposes on courts a duty as onerous as that imposed by art 20 para one of the Conventions. There is of course much merit in assuming that it does. If it does not, then the value of an averment in the initial writ concerning the defender's domicile is clear. If it is averred that the defender is domiciled in another contracting state, then the court should investigate for itself the various factors inherent in jurisdiction. But if on the other hand it is averred that the defender is domiciled in Scotland, and the court as a result of the appropriate enquiries is satisfied that this is indeed the case, it has no duty to investigate ex proprio motu the other factors inherent in jurisdiction.

But even if rule 8 of Sched 8 does impose on the Scottish courts the same duty to consider the question of jurisdiction in actions where

the defender is domiciled in Scotland or Sri Lanka as they have in actions where the defender is domiciled in another contracting state, a court may very well require to be made aware of the defender's domicile in order to carry out the duty imposed on it. It is appropriate here to consider the relevance of the defender's domicile in the context of what are probably the four principal sets of grounds of jurisdiction, other than the domicile of the defender in the state / territory of the court, which are to be found in the Conventions and Act.

Firstly, so far as the exclusive jurisdiction grounds are concerned, it may be argued that in actions where jurisdiction is based on Conventions art 16 / Sched 8 rule 4 it is only the whereabouts of the subject matter of the proceedings, and not also those of the defender, which are relevant for the purposes of jurisdiction. As all the court needs to do is check that the relevant locus is within its territory, it was often said, such actions should be excluded from the scope of rule 3(4)(a). This was of course the view of the Sheriff Principal in Burmy v White.¹⁴⁰

But despite the more than seventeen years of operation of the Brussels Convention in the six original contracting states,¹⁴¹ doubt still exists about the precise extent of the art 16 categories. This matter was referred to above in the prorogation agreement averment context. There is likely to be a not insignificant number of actions where it is not immediately clear whether or not jurisdiction is determined by art 16 / rule 4. It would therefore seem to be in the courts' interest for exclusive jurisdiction actions not to be excluded from the scope of a rule requiring the pursuer in a category

(i) action to make averments relating to the domicile of the defender.

Secondly, the definition of consumer contract to be found in the Conventions is different from that in Sched 4, and both definitions are different from that in Sched 8. And each of the three sets of provisions has slightly different rules for determining where a consumer contract action can be brought. So if an action concerns what may be a consumer contract, in order to establish whether or not it has jurisdiction it is very important for the court to know which one or more of the three schemes of jurisdiction are applicable. The consumer contract jurisdiction rules are a potential minefield¹⁴², and attempts to define their scope in the abstract are all fraught with danger. But if a sheriff is told that the defender is domiciled in another contracting state, he will begin his verification of jurisdiction by focusing on the rules of the Conventions. And if he is told that the defender's only domicile is in Scotland, and there is no suggestion of the dispute having a non-Scottish dimension, he can focus straight away on the consumer contract rules of the Act itself.

Thirdly, with regard to the special jurisdiction rules, a comparison of the three schemes' rules concerning jurisdiction in delict is useful. Article 5 of the Conventions begins: "A person domiciled in a Contracting State may, in another Contracting State, be sued:". Part (3) continues: "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred". In art 5 of Sched 4 the opening words are: "A person domiciled in a **part** of the United Kingdom may, in another **part** of the United Kingdom, be

sued:". In Sched 8, rule 2(3) simply states that as a general rule a person may be sued "in matters relating to delict or quasi-delict, in the courts for the place where the harmful even occurred".

The effect of this is, for example, that if someone domiciled in Dundee is being sued in Edinburgh sheriff court on the basis of the locus of the delict in question being in Edinburgh, jurisdiction is being founded on Sched 8 rule 2(3) alone. But if the defender is domiciled in Dortmund - without also being domiciled somewhere in the United Kingdom - and the locus is in Edinburgh, jurisdiction is being founded on art 5(3) of the Conventions and, arguably, rule 2(3) of Sched 8 too. If a dispute arises concerning the interpretation of rule 2(3), the court must simply have "regard...to any relevant decision of [the European Court] as to the meaning or effect of [art 5(3)]"¹⁴³. But if, on account of the defender's domicile, art 5(3) may itself be applicable, the court can be regarded as having its hands tied. For s 3(1) of the Act states:

Any question as to the meaning or effect of any provision of the Conventions shall...be determined in accordance with the principles laid down by and any relevant decision of the European Court.

So in a category (i) action, which scheme's rule of special jurisdiction may be applicable, or very loosely speaking how the possibly applicable rule of special jurisdiction should be interpreted, will depend on the domicile of the defender. Moreover, if the defender in an action in a United Kingdom court has his only domicile in Dortmund a question concerning the interpretation of art 5(3) can be referred to the European Court; if he is domiciled in Dundee it almost certainly can not.¹⁴⁴

In an action resulting from a road accident, a problem of interpretation of art 5(3) or rule 2(3) may seem highly unlikely. But, in a world with an increasing number of "international" product liability disputes and defamation actions resulting from the publication of newspapers and magazines with transnational circulation, the delict locus jurisdiction rule may become the source of a not insignificant amount of litigation.¹⁴⁵ A rule of court cannot impose a requirement purely in the case of actions where jurisdiction is doubtful and, at least in the vast majority of cases, making an averment relating to the domicile of the defender will not be a difficult task for the pursuer's solicitor. It is submitted that providing the court with information on this matter will, in an increasing number of cases, go some way to enabling it to fulfil the duty imposed on it by art 20 para one of the Conventions.

Finally, in a category (i) action the rules in heavy type in Sched 8 cannot provide the basis of jurisdiction if the defender is domiciled in another contracting state (in certain cases, where the defender is domiciled in any law district of the contracting states other than Scotland) without also being domiciled in the United Kingdom (in certain cases, without also being domiciled in Scotland). If averments have been made about his domicile, the court will, in the event of the defender failing to enter an appearance, be in a much better position to check that the relevant rule in heavy type can be founded on and that there is jurisdiction.

Paragraphs two and three of art 20 of the Conventions provide an additional argument for a pursuer to be required to make the court aware, to the best of his knowledge, right from the beginning of the

action, of the defender's domicile. They state:

The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

The provisions of the foregoing paragraph shall be replaced by those of Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, if the document instituting the proceedings or notice thereof had to be transmitted abroad in accordance with that Convention.

In Sched 4, art 20 contains a para two identical to that of the Conventions, but it has no para three. There are no equivalent provisions in Sched 8.

In the French text of art 20 para two, the words "ce défendeur" are used where "the defendant" appears in the English text and, as a result, it is generally believed that, in view of the wording of para one, para two is only applicable in the case of an action brought against a defender who is domiciled in another contracting state.¹⁴⁶ Presumably a corresponding interpretation can be given to para two of art 20 in Sched 4: the duty to stay the proceedings can only arise where the defender is being sued in a United Kingdom law district other than the one where he is domiciled.

The effect of art 20 para two of the Conventions and Sched 4 is then that, as a general rule, if an action falls within the subject matter scope of the Conventions and Sched 4, and the defender is domiciled in another United Kingdom law district or in another contracting state, even if the court does have jurisdiction, it must nevertheless, in the event of the defender failing to enter an appearance, sist the proceedings until he has been given what is

considered a proper opportunity to defend the action. The court's duty almost certainly arises prior to any minute for decree being lodged.

The practical effect of the duty is probably that, unless the measure sought is "provisional or protective", an interim application cannot be made to the court unless the defender has appeared or the provisions of art 20 para two have been complied with. And no period of time can run to the prejudice of a defender until he appears or there has been compliance with the provisions. The Scottish courts have no such duty in the case of actions against defenders domiciled in Scotland or outside the contracting states,¹⁴⁷ and so a court can only fulfil its art 20 para two duty if it has been made aware of the domicile of the defender in the action before it. And it is clearly much more satisfactory for the court to be informed of the domicile of the defender right at the beginning of the action, rather than only when the pursuer seeks an interim award or decree in absence.

Article 20 para two of the Brussels Convention was regarded by both Jenard¹⁴⁸ and Droz¹⁴⁹ as a transitional provision. The effect of art 20 para three would appear to be that, when a defender domiciled in one contracting state is sued in another but does not enter an appearance, if the "document instituting the proceedings or notice thereof" had been sent abroad in accordance with the 1965 Hague Convention referred to in para three, the question of whether or not the case can proceed to judgment is to be determined by art 15 of the Hague Convention rather than by art 20 para two of the Brussels Convention.

Only one of the other EC states is not a party to the Hague Convention,¹⁵⁰ and three of the six EFTA states are parties to it.¹⁵¹ So in the majority of actions where it is applying one of the provisions, a Scottish court is likely to be applying Hague Convention art 15 rather than Brussels Convention art 20 para two. But there will be a not insignificant number of cases where Brussels Convention art 20 para two is still applicable. For example, a defender may be domiciled in, and served with the appropriate document in, an EC or EFTA state which is not a party to the Hague Convention. And a defender domiciled in an EC or EFTA state which is a party to the Convention may be served with the document in the state of the court where the proceedings are to take place - in this case the United Kingdom.

The rules of citation / service are of course quite separate from the rules of jurisdiction.¹⁵² An individual whose sole domicile is in another contracting state may have service effected on him while he is in Scotland if, for example, one of the art 5 rules of special jurisdiction gives Scottish courts jurisdiction. And a legal person only domiciled in another contracting state may well find itself being served with the appropriate document at its branch in Scotland if jurisdiction is being based on art 5(5).

So it is far from true that Brussels Convention art 20 para two has been, or is about to be, effectively replaced by, Hague Convention art 15. Of course, had this statement - which is not infrequently made - been correct, then knowledge of the defender's domicile would not have been required for the purposes of compliance with Brussels Convention art 20 paras two and three. For Hague Convention art 15

makes no reference to the domicile of the defender, and the Ordinary Cause Rules make it clear¹⁵³ that, if service is to take place in a state which is a party to the Hague Convention, there must, irrespective of the defender's domicile, be compliance with the rules of the Convention - in particular with art 15.

A further point of relevance is that, as stated above, the art 20 in Sched 4 has no para three. If a defender domiciled in one United Kingdom law district is being sued in another, service abroad will at least as a general rule not be necessary. If the defender is an individual, he can be cited at his residence in the United Kingdom.¹⁵⁴ And if the defender is a legal person, it can be cited at a registered office or place of business in the United Kingdom.¹⁵⁵ It was presumably for this reason that reference to the Hague Convention was thought not to be necessary in Sched 4. So if a defender domiciled in England and Wales, or in Northern Ireland, fails to enter an appearance in a Scottish court, it is apparently always the "art 20 para two" test which is to be applied. And it is only if the court has been informed of the domicile of the defender that it can know that Sched 4, art 20 para two is applicable.

To be in a better position to fulfil the duty imposed on it by para two of art 20 of the Conventions and Sched 4, as well as that imposed by para one, a Scottish court should therefore, in any action within the subject matter scope of the Conventions, be made aware, in the initial writ, of the domicile of the defender, as far as this is known to the pursuer. And the duty imposed by art 20 para two, it should be noted, exists in exclusive jurisdiction actions just as much as in non-exclusive jurisdiction ones. Contrary to what is

implied by Anton and Beaumont,¹⁵⁶ the rule of court requiring an averment concerning the domicile of the defender was not imposing "an unnecessary requirement where the action is founded on Art. 16 of the 1968 Convention".

But what if there is more than one defender? And what if the defender / a defender has more than one domicile? With regard to the question concerning actions with two or more defenders, it is undoubtedly true that, at least as a general rule, if the court has jurisdiction over one defender on account of his / its domicile in its territory it will have jurisdiction over both or all of them. Article 6(1) of the Conventions provides that

[a] person domiciled in a Contracting State may also be sued: where he is one of a number of defendants, in the courts for the place where any one of them is domiciled.

There is a corresponding rule in art 6(1) of Sched 4, and in Sched 8 rule 2(15)(a) provides simply that as a general rule

a person may....be sued where he is one of a number of **defenders**, in the courts for the place where any one of them is domiciled.

But it would be most unsatisfactory if a pursuer averring that one defender was domiciled in the territory of the court was not required to make averments relating to the domicile of the other defender(s). If averments are made concerning the domicile of each defender, then, on account of the importance of domicile in the schemes of jurisdiction, in the event of jurisdiction over the first defender being in doubt the court is in a better position to consider its jurisdiction over the other defender(s).

A further argument for averments concerning the domicile of each defender being required concerns art 20 para two. This provision is of course designed to give an element of protection to defenders being sued in a contracting state where they are not domiciled. Where more than one defender is being sued outside the state of his domicile, the element of protection should clearly be given to each one. And it can only be given to any one if the court is made aware of his being domiciled in another contracting state.

But, turning to the other question, to require a pursuer to make averments concerning each of a defender's domiciles would be impractical. Fortunately, on account of the wording of the various rules of jurisdiction of the Conventions it is also unnecessary. If a defender is domiciled in the United Kingdom, as a general rule art 2 gives the United Kingdom courts jurisdiction; whether the defender is also domiciled in another contracting state is of no consequence. And if a defender is domiciled elsewhere in the contracting states but not in the United Kingdom (and United Kingdom courts have jurisdiction on account of a rule of special jurisdiction) it makes no difference whether he is domiciled in one place or in one hundred in the other contracting states.

Paragraphs one and two of art 20 of the Conventions are both concerned with the situation where a defender domiciled in one contracting state is being sued in another contracting state where he is not domiciled. It is generally accepted that art 20 has not been included in the Conventions in order to give protection to a defender who is domiciled in two contracting states and is being sued in one of them. So if a defender in an action in a Scottish court is

domiciled in the United Kingdom, art 20 cannot be applicable.¹⁵⁷

The wording of the rules of jurisdiction in Sched 4 also makes the ascertaining of each of a defender's domiciles unnecessary. The whole approach of these rules is of course based on that of the rules of jurisdiction of the Conventions. And in Sched 4, art 20 is concerned with the situation where a defender who is domiciled in one United Kingdom law district is being sued in another where he is not domiciled. It is not applicable where an individual domiciled in both England and Scotland is being sued in a Scottish court.¹⁵⁸

In other words, if the defender in an action in a Scottish court is domiciled in Scotland, whether or not he is also domiciled elsewhere in the contracting states is of no significance. And if the defender is not domiciled in Scotland, but is domiciled in England and Wales, or in Northern Ireland, any domicile of his in another contracting state is irrelevant.

It is worth mentioning that, in any event, neither the Conventions nor the Act provides any mechanism for determining whether a natural person domiciled in the state of the forum is also domiciled in another contracting state. Article 52 para two begins: "If a party is not domiciled in the state whose courts are seised of the matter..."

In concluding, the writer would suggest that Ordinary Cause Rules, rule 3(4) be amended to read:

(a)(i) In any cause which, by reason of its subject matter, falls within the scope of the 1968 Brussels Convention and 1988 Lugano Convention, whether or not jurisdiction is determined by the provisions of either Convention, the initial writ shall, in the event

of one or more defenders being domiciled in Scotland, contain appropriate averments to this effect; in the event of one or more defenders being domiciled in England and Wales or in Northern Ireland but not in Scotland, the initial writ shall contain appropriate averments to this effect; in the event of one or more defenders being domiciled in a state to which one of the said Conventions applies, but not in the United Kingdom, the initial writ shall contain appropriate averments to this effect; in the event of one or more defenders not being domiciled in any of the States to which either of the said Conventions applies, the initial writ shall contain appropriate averments to this effect.¹⁵⁹

(ii) For the purposes of part (i), "domiciled" shall be construed as "domiciled in terms of sections 41 to 46 of the Civil Jurisdiction and Judgments Act 1982 and articles 52 and 53 of the said Conventions".¹⁶⁰

(b) The initial writ shall contain appropriate averments of the ground of jurisdiction of the court.¹⁶¹

The rule 3(4)(a) which is being suggested is longer and more complicated than both the suggested rules 3(2) and 3(3) and the domicile averment rule which existed from 1 January 1987 to 30 November 1988. Some comments on the rule and its particular wording are therefore appropriate. Firstly, it may be argued that if in any action the jurisdiction of the court depended even in part on where the defender was or was not domiciled, averments relating to domicile would be required by rule 3(4)(b) and, as a result, rule 3(4)(a) would be unnecessary. But a point similar to that which was made in

the context of averments relating to prorogation agreements can easily be made here. It is that if the pursuer's solicitor were asked what he regarded as the ground of jurisdiction of the court, he would in all probability simply state something such as "the accident having taken place in the sheriff court district" or "the disputed property being in the sheriff court district". He would not say: "the property being in the sheriff court district and the defender not being domiciled anywhere in the contracting states". Without a provision such as that in rule 3(4)(a), solicitors would only make averments relating to the domicile of the defender if jurisdiction was being based on this domicile being in the sheriff court district.

Moreover on account of the existence of art 20 para two of the Conventions and Sched 4, the court should be made aware of the defender's domicile. And these provisions do not strictly speaking concern jurisdiction. So if in a particular action the defender's domicile was not in fact relevant to the jurisdiction of the court, the pursuer's solicitor could fully comply with rule 3(4)(b) without referring to that domicile, but the court would not be in a good position to fulfil the duty imposed on it by art 20 para two of the Conventions and Sched 4.

Secondly, the words "whether or not jurisdiction is determined by the provisions of the Conventions" are included. This is because actions which are purely internal to one contracting state may be outside the scope of the Conventions as a whole.¹⁶² But in all actions the pursuer's solicitor should be required to make appropriate averments relating to the domicile of the defender. For one thing it is not clear if purely internal actions are excluded from the scope of the

Conventions. But even if they are, if the court is unaware of the domicile of the defender, it cannot be sure that the action before it is an internal one and therefore outside the scope of the Conventions as a whole.

Thirdly, there is a reference to "appropriate averments". The solicitor is not told what the appropriate averments are in the case of, for example, a company with numerous domiciles in England and Wales but none in Scotland. But rules of court are concerned primarily with procedure, not with the details of pleadings. And it would not be possible for those drafting the rules of court in a few lines to take account of all the situations which may arise. Some matters must be left to the good sense of practitioners. If problems occur in practice, case law, Acts of Court and sheriff clerks' policies can provide guidance as to what is appropriate.¹⁶³ A provision relating to a particular point could even be inserted into the rules of court.

In the case of the company domiciled in England - which might, for example, be sued in Glasgow sheriff court because the place of performance of the contractual obligation in question was in Glasgow - it should normally be appropriate simply to aver that it was incorporated under English law, that it has its registered office in [a particular place] and that it has numerous places of business in England and Wales. If it was incorporated under English law and has its registered office in England, it is domiciled in England and Wales. It is only if there is some doubt about this matter that the places of business might become significant; averments about their location and about the business carried out in them could, if

necessary, be introduced at a later stage.

Fourthly, on account of the wording of each of the rules of jurisdiction in the Conventions and in Schedules 4 and 8, for the purposes of the jurisdiction of the Scottish courts domiciles can, as implied above, be divided into (a) those in Scotland, (b) those in another United Kingdom law district, (c) those in another contracting state and (d) those outside the contracting states. If an individual or a business has a category (a) domicile, any category (b), (c) or (d) domicile is irrelevant. If he / it has a category (b) domicile (but no category (a) domicile), any category (c) or (d) domicile is irrelevant. And if he / it has a category (c) domicile (but no category (a) or (b) domicile), any category (d) domicile is irrelevant. That is why the latter part of the draft rule 3(4)(a)(i) is expressed as it is. This "order of priority" of domiciles can be illustrated by one or two examples.

Let us first take the case of an individual who is domiciled in France and in the United Kingdom. It is wished to bring against him in the United Kingdom an action concerning a tort, the harmful event of which occurred in the United Kingdom. Is art 5 of the Conventions relevant? It provides, of course, that

[a] person domiciled in a Contracting State may, in another Contracting State, be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred.

It is generally considered that the rules of special jurisdiction are not applicable where the defender is domiciled in the contracting state where the locus is situated as well as in another contracting state.¹⁶⁴ The rules of special jurisdiction are designed to enable

defenders to be sued in certain circumstances in particular courts of contracting states where they are not domiciled. Allocating jurisdiction to particular courts in states where they are domiciled is not one of their functions; that is a matter which can adequately be left to the local law. So in the action against the individual domiciled in France and the United Kingdom, in a United Kingdom court jurisdiction could not be based on art 5(3) of the Conventions. Loosely speaking, the United Kingdom domicile has priority over the French one.

Let us now take an example involving a rule of "exorbitant" jurisdiction available in the United Kingdom. It is in fact in the context of "exorbitant" jurisdiction that the practitioner may feel that domiciles outside the United Kingdom are always of relevance. It is indeed often said that if a defender is domiciled in another contracting state, the rules of special jurisdiction - exorbitant jurisdiction - in heavy type in Schedule 8 cannot provide jurisdiction in an action against him. But if the defender is domiciled in the United Kingdom as well as in the other contracting state, his domicile in the other contracting state is actually immaterial.¹⁶⁵ In Schedule 8, rule 2(9)¹⁶⁶ is probably in practice one of the more often used rules of "exorbitant" jurisdiction, and use can be made of it to illustrate this point.

If someone who would generally be regarded as a Frenchman has a holiday home in Inverness, and spends several weeks there every year, he may well be domiciled in the United Kingdom and in Scotland in terms of s 41 of the Act. If as a matter of law - Scots law - he is resident in Inverness, and the nature and circumstances of his

residence indicate that he has a substantial connection with the United Kingdom and with Scotland in particular, the tests in s 41(2) and (3) will have been satisfied. So art 2 of the Conventions allows him to be sued in the United Kingdom courts, and Sched 4, art 2 allows him to be sued in the Scottish courts. As a result, if it is wished to bring an action against him in Glasgow sheriff court, concerning the ownership of moveable property in Glasgow, jurisdiction can be based on the "exorbitant" provision in rule 2(9) of Sched 8.¹⁶⁷ The fact that what would be regarded as his principal residence is in Paris is quite irrelevant. Once again the United Kingdom domicile has priority.

It is true, it should be said, that art 3 of the Conventions states:

Persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of....this Title.

In particular the following provisions shall not be applicable as against them:

.....

- in the United Kingdom: the rules which enable jurisdiction to be founded on: (b) the presence within the United Kingdom of property belonging to the defendant.

But at the beginning of art 3 what "another Contracting State" means is: "a Contracting State where they are not domiciled".¹⁶⁸ The writer is aware that the question of the applicability of the rules of "exorbitant" jurisdiction has caused some uncertainty among practitioners. But for those who have published material on the Conventions it is a trite point that a state is perfectly free to allocate jurisdiction in whatever way it chooses over those against whom proceedings can be brought in it by virtue of art 2 of the

Conventions. In allocating jurisdiction to particular courts, there is nothing to prevent it using connecting factors which are not used in the Conventions. It could if it so wished use as its general connecting factor residence rather than domicile, and it can use grounds of "exorbitant" jurisdiction specifically prohibited by art 3 para two in the case of persons not domiciled in it but domiciled in another contracting state.

In connection with the "order of priority" of domiciles it should also be mentioned that in art 20 para one of the Conventions the opening words "Where a defendant domiciled in one Contracting State is sued in a court of another Contracting State" should be read as "Where a defendant domiciled in one Contracting State is sued in a court of a Contracting State in which he is not domiciled". For the provision is designed to protect defenders who are being sued in a contracting state where they are not domiciled. A corresponding interpretation can be given to the opening words of art 20 para one in Sched ¹⁶⁹ 4.

It was stated above that in para two of art 20 in the Conventions the words "Where a defendant domiciled in one Contracting State is sued in a court of another Contracting State and does not enter an appearance" should be considered as coming before what appears in the text. The words which should be read into the provision are in fact: "Where a defendant domiciled in one Contracting State is sued in a court of a Contracting State in which he is not domiciled and does not enter an appearance". For once again it is the protection of persons not domiciled in the contracting state where they are being sued which is intended. In Schedule 4, art 20 para two should be

considered as beginning in a similar way. So, to sum up here, for the purposes of Section 7 of Title II of the Conventions, as well as for the purposes of the rules of jurisdiction themselves, it is appropriate for the averments in the initial writ concerning the defender's domicile only to relate to the domicile which is, loosely speaking, closest to the court in which the action is being brought.

The suggested rule 3(4)(a)(i) concludes by stating that, if this is the case, it should be averred by a pursuer in his initial writ that the defender is not domiciled in any of the contracting states. An individual may, of course, be domiciled in both a contracting state and a non-contracting state, so it is important for a negative averment to be made in the event of the defender not having a domicile within the contracting states.¹⁷⁰ On account of the relevance of the defender's domicile in a category (i) action to both the jurisdiction of the court and the progress of the action, the court should not be expected to consider a lack of any averment about the defender having or not having a domicile within the contracting states as signifying that the pursuer is not aware of there being any domicile there. Requiring a pursuer to make a negative averment does not seem unreasonable. On account of its duty set out in art 20 of the Conventions, the court cannot simply assume that such a negative averment is correct. But it nevertheless is of some value.

As any domicile in a non-contracting state is of no significance in the application of Title II of the Conventions,¹⁷¹ it can be argued that an averment that a defender is domiciled in a particular non-contracting state would be irrelevant. But it is submitted that it would be good practice for a pursuer's solicitor to aver that the

defender's only domicile was in Pakistan or Peru or wherever it happened to be. This would provide the court with a good starting-point for the enquiry which it might have to make into the question of whether the defender was in fact domiciled in a part of the contracting states other than Scotland.

Finally, the reference in rule 3(4)(a)(ii) is to "articles 52 and 53". Because of the difference in wording between arts 52 and 53 of the Conventions, reference to art 53 may strictly speaking be unnecessary, and in fact the rule of court which existed from 1 January 1987 to 30 November 1988 made no reference to art 53. In determining the domicile of an individual, art 52 provides that foreign rules of law may be relevant; s 41 of the Act refers to art 52. But in determining the domicile of a legal person, s 42 is alone applicable - unless it directs the court to another system of law. For art 53 provides that in this context it is the lex fori which is to be applied. However an absence of reference to art 53 in the rule of court could lead to puzzlement.

7 The averring of jurisdiction as a whole

As stated near the beginning of this Part, prior to 1 January 1987 it was the practice for an averment relating to the jurisdiction of the court to be included in each initial writ.¹⁷² If jurisdiction was based on the defender's residence in the sheriff court district, and his address in the sheriff court district appeared in the instance, the averment might very well simply state: "The parties are as designed in the instance." Many solicitors may have been far from certain as to the justification for beginning the condescendence in almost all of their initial writs with this averment; they inserted these words simply because they had been taught to do so and their fellow civil court practitioners were doing the same.

But the explanation is that at common law an initial writ should set out the facts which, if proved, enable the court to grant the decree sought. A defender was - and of course is - entitled to base his case that the court should not grant decree against him on arguments relating to the substance of the claim and / or to the jurisdiction of the court. The pursuer's case concerns both matters, so both matters have been required to be referred to in the condescendence. Some practitioners, it should be said, considered that, for there to be compliance with the common law rule, the first averment should actually state the defender's residence, and not simply refer the reader to the instance. But they were in a minority and the matter was never resolved by the Court of Session.

The common law justification for averments relating to the jurisdiction of the court being included in each initial writ still holds good, and there is now the additional argument that the a court

is in a much better position to fulfil the duty imposed on it by art 20 of the Conventions, and arguably also by art 20 of Sched 4 and rule 8 of Sched 8, if it is aware of the pursuer's grounds for believing that it has jurisdiction. So, it is submitted, it is very difficult to dispute the desirability of a rule of court setting out the pursuer's duty in category (i) actions to make appropriate averments relating to jurisdiction. Schedule 8 applies to category (ii) actions too, and the common law rule relating to the role of initial writs extends to category (iii) actions. So, it is submitted, the application of a rule of court concerning averments of jurisdiction should not be restricted to particular types of actions. The form of words used in the present rule 3(4) seems reasonable. As a result, at the end of the last section of this chapter the writer suggested that the present rule 3(4) be retained and renumbered rule 3(4)(b).

As in the case of the suggested rule 3(4)(a), it would not be appropriate for the rule of court to go into detail about what should be averred. There is however a general view, with which the writer certainly agrees, that on account of the duty imposed on the courts by the Act, averments of jurisdiction should now be lengthier than they were prior to the Act's coming into force. If, for example, jurisdiction in an action is being based primarily on rule 2(2) of Sched 8, an averment along the following lines - which is no more than an adaptation of the words of the rule itself - would be of very limited value to the court and could therefore with much justification be held to be insufficient - using the appropriate terminology, to be lacking in specification:

The action relates to a contract and this court is a court for the place of performance of the obligation in question.

It does not seem unreasonable for the pursuer to be expected, in the averment relating to jurisdiction, briefly to inform the court of the type of contract concerned, the nature of the obligation in question and the place of performance. In the event of the defender failing to enter appearance, the court could then much more easily set about its task of verifying its jurisdiction. Of course the subsequent articles of the condescendence ought to contain averments relating to the type of contract, the nature of the obligation and the place of performance. But there is a danger that the relevant points will be lost in verbiage there; it is in the interests of all concerned for them to be summarised in the first article of condescendence.

Even if it were held to be good pleading to refer in the condescendence to the instance, it would no longer be appropriate, in the event of the defender living in the sheriff court district, simply to aver: "The parties are as designed in the instance." For one thing, the defender's address given in the instance may be considered as being - at any rate in the pursuer's submission - his residence, but an individual is not domiciled at a place merely because he is resident there. It is clear from the words "nature and circumstances of his residence" in s 41 of the Act that domicile requires something more than residence.

And of course, for the reasons which the writer has set out above, he considers that there should be included in each initial writ averments concerning the possibilities of there being a relevant prorogation agreement or an identical action elsewhere, and also

concerning the defender's domicile. (The averments concerning these matters are averments relating to jurisdiction; the averments of domicile are also averments relating to the court's duty under art 20 para two of the Conventions and Sched 4.) But for the avoidance of doubt it should be said that if in an action the jurisdiction of the court is based on the defender being domiciled in the sheriff court district, one set of averments would satisfy the requirements of both 3(4)(a) and 3(4)(b) in the writer's suggested rules.

It is the writer's view that, in the case of an action in Aberdeen sheriff court, the following averment would be adequate (for the purposes of both rule 3(4)(a) and rule 3(4)(b)) at the initial stages:

The defender is resident in Bielside. He has been resident there during the three months immediately prior to the bringing of this action. He is domiciled there. This court accordingly has jurisdiction.

If the pursuer proves that the defender has been resident for the last three months in Bielside, and there is no appearance by the defender, the court must presume that the defender is domiciled in the sheriff court district. For s 41(4) states that an individual is domiciled in a particular place in the United Kingdom if he is domiciled in the part of the United Kingdom in which the place is situated and he is resident in the place. In this example the defender is resident in Bielside, which is in the sheriff court district. One effect of s 41(3) is that an individual is domiciled in Scotland if he is resident in Scotland and the nature and circumstances of his residence indicate that he has a substantial connection with Scotland.

The defender is resident in Scotland. With regard to the nature and circumstances of his residence, s 41(6) is of relevance. It provides that if an individual has been resident for the last three months in a United Kingdom law district, it is to be presumed that the nature and circumstances of his residence indicate that he has a substantial connection with that law district. In the case of the defender, the presumption can be made with regard to Scotland. So, returning to s 41(3), it is to be presumed that the defender is domiciled in Scotland. And on account of s 41(4) it is to be presumed that he is domiciled in the sheriff court district.

Of course if the defender enters an appearance and argues that he is not domiciled in the sheriff court district, the pursuer must then expand on his initial averments. But it is submitted that, at the initial stages and as long as the jurisdiction of the court is not being contested by the defender, on account of his having made these simple averments the pursuer is complying with the common law rule that his case must be set out in the initial writ. He is also providing the court with an adequate starting point for any enquiry concerning its jurisdiction which the Act may require it to make. So far as the court's verifying its jurisdiction is concerned, these averments would provide a basis for the making of submissions by the pursuer's solicitor at the bar, or for the lodging of affidavits signed by the pursuer and a witness. They give the defender adequate notice of the pursuer's case that he has been resident in the sheriff court district during the relevant three month period.

The writer understands that his approach to averring domicile in the

sheriff court district is in fact that adopted in almost all of the sheriff courts. But in one or two sheriff courts¹⁷³ a pursuer will only be granted warrant for service if he avers that the nature and circumstances of the defender's residence in Scotland indicate that he has a substantial connection with Scotland. It is respectfully submitted that the approach taken in these courts is wrong.

As was implied above, at common law the purpose of written pleadings is to set out the facts which, if proved, entitle the party concerned to decree in the terms specified. If it is admitted by the defender that there has been three months' residence on his part in the sheriff court district, or if he does not appear and contest the matter, or if after proof his three months' residence is held proved without any relevant case of his also being proved, the court must treat the defender as being domiciled in its territory. Unless and until the defender enters an appearance and argues that the nature and circumstances of his residence do not indicate that he has a substantial connection with Scotland, there is no need for the pursuer to prove anything more than three months' residence on the defender's part. So initially his written case need not - indeed probably should not - concern anything more than the fact that there has been three months' residence by the defender in the sheriff court district. If the defender makes averments relating to the nature and circumstances of his residence, the pursuer will of course have an opportunity to adjust or amend his own pleadings.

When a pursuer makes averments concerning the jurisdiction of the court, he is of course now doing so not only to comply with the common law rule relating to the setting out of his case, but also to

give the court information which will be of assistance to it in the fulfilling of the duty imposed on it by the Act. But the existence of this new duty to verify jurisdiction, like the common law duty, does not require the making of an averment specifically referring to the nature and circumstances of the residence concerned. For, as explained above, if there is held to have been three months' residence in the sheriff court district, on account of s 41(6) it is in effect presumed that the defender is domiciled in the sheriff court district. And there is no practical difference between a defender simply being held to be domiciled in a particular place and his being presumed to be domiciled there. In each case the court must proceed on the basis that he is domiciled there.

So, for example, if a defender who has not entered an appearance is undoubtedly domiciled in Italy in terms of Italian law, and by virtue of s 41(6) is presumed to be domiciled in Scotland, in considering its jurisdiction over him the Scottish court can disregard the Italian domicile. By establishing that there has been three months' residence in its district - and that there is no valid prorogation agreement or identical action elsewhere - the court will have fulfilled the duty imposed on it by art 20 para one of the Conventions.

It is to be hoped that, for the sake of both consistency of approach throughout Scotland and a correct application of the law, the sheriff principal within whose sheriffdom the courts concerned are situated, or the Court of Session, will have and take the opportunity to hold that, at least at the initial stages of an action, an averment relating to three months' residence by the defender in the sheriff

court district (coupled of course with averments concerning the issues of prorogation agreements and identical actions) is perfectly adequate.

If the defender is not an individual but a limited company, a similar problem cannot arise; s 42 makes no provision for any presumption. In the case of an action in Dundee sheriff court against an English company with a place of business in Dundee, there would be compliance with the suggested sheriff court rules 3(4)(a) and 3(4)(b) if an averment were to read:

The defenders are a company incorporated under the Companies Acts. Their registered office is in London. They have a place of business in Dundee. They are domiciled in Dundee. This court accordingly has jurisdiction.

In s 42, the effect of subsections (3), (4) and (5) is that, if a company "was incorporated....under the law of a part of the United Kingdom and has its registered office....in the United Kingdom", it has a seat - and therefore domicile - in every place in the United Kingdom where it has a place of business. At the initial stages, it is submitted, it is unnecessary to make averments relating to the nature of the business at the place of business in the sheriff court district; such averments can if appropriate be added at the adjustment stage. There is of course no need to make averments relating to any other places of business, and therefore any other domiciles, which the company might have elsewhere in Scotland or in England. If the company is domiciled in the sheriff court district, such domiciles cannot affect the jurisdiction of the court. The point has already been made that the domicile which is of significance is the one which is, loosely speaking, closest to the court.¹⁷⁴

If the company is in due course held not to be domiciled in the sheriff court district, it will not be prejudiced by its domiciles elsewhere not having been mentioned in the pursuer's averments. For if the pursuer wishes to attempt to continue the action with jurisdiction based on a different ground - such as a Sched 4 ground of special jurisdiction - he must then have appropriate averments relating to both the domicile of the company (rule 3(4)(a)) and the jurisdiction of the court (rule 3(4)(b)) inserted into the condescendence.

This chapter is concerned primarily with rules of court, not with written pleadings. It would therefore not be appropriate for there to be set out and discussed here averments of jurisdiction suitable in other circumstances. As stated at the beginning of this Part, such averments are to be found in an article by Black in the Scots Law Times.¹⁷⁵

8 Sheriff court summary causes and small claims: specific comments

(a) Summary causes

The relevant provisions introduced by Act of Sederunt ¹⁷⁶ on 1 January 1987 were as follows:

Rule 2

(2) The statement of claim shall contain averments about any agreement which the pursuer has reason to believe may exist prorogating jurisdiction over the subject matter of the cause to another court.

(3) The statement of claim shall contain averments about any proceedings which the pursuer has reason to believe may be pending before another court involving the same cause of action and between the same parties as those named in the initial writ.

(4) The statement of claim shall specify-

(a) the domicile of the defender as determined in accordance with sections 41 to 46 of, and article 52 of Schedule 1 to, the Civil Jurisdiction and Judgments Act 1982; and

(b) the ground of jurisdiction of the court.

¹⁷⁷
In 1988 the whole of rule 2(4) was deleted. So the rules of court now contain no obligation on pursuers in summary causes to make averments concerning either the domicile of the defender or the jurisdiction of the court in general. And, as is to be expected in view of the approach to averments of jurisdiction in ordinary causes, rules 2(2) and 2(3) are interpreted as not requiring negative averments to be made. The wording of rules 2(2) and 2(3), it should be said, follows as far as possible that of the equivalent ordinary cause rules. But rule 2(3) should refer to "the summons" rather than to "the initial writ".

The writer understands that it is in fact the practice for solicitors commencing summary cause proceedings in many if not all of the sheriff courts to begin the statement of claim in each summary cause

summons with averments concerning the jurisdiction of the court. But, as in ordinary actions, averments concerning the domicile of the defender are only included if jurisdiction is being based on the defender's domicile being in the sheriff court district. He has been told by the sheriff clerk depute responsible for summary causes in Edinburgh sheriff court that this is the practice in Edinburgh sheriff court and that the present practice is generally regarded by those concerned as satisfactory.

Summary causes are defined by s 35 of the Sheriff Courts (Scotland) Act 1971 as amended,¹⁷⁸ and as a general rule the sum at stake in a summary cause is not high. Section 35(1)(a) as amended provides that actions for payment of money not exceeding £1,500 constitute summary causes. However actions ad factum praestandum where a sum in excess of £1,500 is not claimed in addition to, or as an alternative to, the delivery or implement are also summary causes.¹⁷⁹ Actions ad factum praestandum usually include a monetary claim, but an action ad factum praestandum without such a claim will in principle proceed as a summary cause even though what the court is being asked to order the defender to do would be of considerable significance. However, provision exists for such summary causes to be transferred to the roll of ordinary causes.¹⁸⁰

Is there any justification for the summary cause rules' requirements relating to averments of jurisdiction being any different from the requirements in the ordinary cause rules? In the writer's opinion there is not. The courts have the same duty to verify their jurisdiction, and in certain circumstances to sist the proceedings, in summary causes as they have in ordinary causes. Even if the sum

effectively at stake in summary causes was always under £1,500, this would not justify the court paying less attention to the factors relating to jurisdiction in summary causes than in ordinary causes.

If it is not told about its jurisdiction in the pursuer's original pleadings, the court is in no better a position in summary causes than it would be in ordinary causes to consider whether an action should be sisted or dismissed in terms of a provision of art 20 of the Conventions or Sched 4 or rule 8 of Sched 8. It cannot be argued that party litigants would not understand rules of court along the lines of the Ordinary Cause Rules, rule 3(4) suggested by the writer. For one thing, such rules would not be more difficult to understand than the present Summary Cause Rules, rule 2(2) and (3). And many of the other Summary Cause Rules are far from easy for the layman to understand. It is therefore submitted that rule 3 of the Summary Cause Rules ought to contain rules which, as far as possible, follow the wording of the provisions which the writer considers should form rule 4 of the Ordinary Cause Rules.

(b) Small claims

Small claims are, strictly speaking, a type of summary cause,¹⁸¹ but on account of the separate set of rules applying to them they are usually considered on their own. Section 35(2) of the Sheriff Courts (Scotland) Act 1971 made provision for the introduction of the small claims procedure, and art 2 of the Small Claims (Scotland) Order¹⁸² 1988 provides that as a general rule actions for payment of money not exceeding £750, and actions ad factum praestandum with an alternative claim for a sum not exceeding £750, are to be treated as small

claims.

The relevant part of the Small Claim Rules ¹⁸³ (which have been in force since 30 November 1988) is as follows:

Rule 3

(4) The pursuer shall give a statement of his claim in the summons to give the defender fair notice of the claim; and the statement shall include-

.....

(c) a reference to any agreement which the pursuer has reason to believe may exist giving jurisdiction over the subject matter of the small claim to another court;

(d) a reference to any proceedings which the pursuer has reason to believe may be pending before another court involving the same cause of action and between the same parties as those named in the summons.

There is no rule requiring either the domicile of the defender or the jurisdiction of the court to be stated. In British Gas v Darling ¹⁸⁴ it was held by the Sheriff Principal of Glasgow and Strathkelvin that, at the stage of warrant for service being sought, the small claims rules

leave it....to the sheriff clerk or sheriff to apply their awareness of grounds of jurisdiction. Details relevant to this matter may be gleaned from the statement of claim, and may also be gleaned from other parts of the summons....For instance, if, as in this case, the defender is designed as residing at an address within the jurisdiction that, in my opinion, suggests, prima facie, that the defender is domiciled within the jurisdiction.¹⁸⁵

In view of the lack of reference to questions of jurisdiction in the Small Claims Rules, this decision is to be welcomed. The Sheriff Principal referred to the "perplexing provisions of the Civil Jurisdiction and Judgments Act 1982", ¹⁸⁶ and would appear to be aware that in category (i) and category (ii) actions the Act imposes on the

Scottish courts a duty to look into matters relating to jurisdiction. But the writer is unaware of whether the matter of jurisdiction in small claims is approached in the other sheriffdoms in the same way as it is approached in Glasgow and Strathkelvin.

It is appreciated that it is hoped that in very many actions proceeding as small claims pursuers themselves will be able to present their case to the court in writing and then, if necessary, orally. A large number of complex rules relating to pleading would not be conducive to litigation carried out by the parties themselves. But it is submitted that if reference were to be made in the Small Claims Rules to the various issues relating to jurisdiction, and the approach to the whole matter were very different from that of those who drew up the present rule 3(4)(c) and (d), then the sheriff clerk or the court would reach the correct conclusion with regard to jurisdiction more often and more quickly than at present.

It would reach the correct conclusion more often if only because the matters of prorogation agreements and identical actions would be brought to the attention of all pursuers, and not effectively hidden away in the rules of court as at present. And it would do so more quickly because the pursuer would be putting down in writing points relating to jurisdiction. Of course these statements could not simply be accepted by the court any more than averments on jurisdiction in initial writs in ordinary causes may be. But a court has as much of a duty to verify its jurisdiction in the case of a small claim as it has in the case of an ordinary action, and what is being suggested would provide the court in a small claim with a useful starting point for its enquiry into its jurisdiction.

What the writer suggests is this. Small claims are begun by the completion of a form; the completed form serves as the summons. Appendix 1 to the Small Claims Rules sets out the various forms; the pursuer will obtain a printed copy of the appropriate form at his local sheriff court, fill in the blanks and send it to the court where he wishes to bring the action. On page one he must insert details of the parties; on page two he must complete the section which begins: "The details of the claim are". There could be included in the printed form, perhaps most appropriately between the details of the parties and those of the claim, questions relating to jurisdiction. The questions would be simple and perfectly comprehensible to any layman capable of filling in the form as a whole, but at the same time the answers to the questions would be of significant value to the court.

The new part of the form which the writer has in mind is as follows:

If the defender is an individual, you should complete sections A, B and D below. If it is a business or another type of body, you should complete sections A, C and D.

Section A

1 Have you ever agreed with the defender, or may someone acting on your behalf ever have agreed with him / her, that a claim such as this one should be made in a particular court?

yes / no / don't know

Note: If you answer "yes" or "don't know", you should give details below.

2 Is there, or might there be, taking place in another court another case between you and the defender concerning the same claim as this one?

yes / no / don't know

Note: If you answer "yes" or "don't know", you should give details below.

Section B

3 Is the defender resident in the sheriff court district? (The sheriff clerk can tell you what towns and villages are in the sheriff court district.)

yes / no / don't know

4 (If the answer to 3 is "yes".) Has the defender been resident in the sheriff court district during the last three months?

yes / no / don't know

5 (If the answer to 3 is "no".) Where is the defender resident?

You should insert here the name(s) of the town(s) / country/ies where he is resident.

6 (If you answered "yes" to 3, and "no" or "don't know" to 4.) What links does the defender have with the sheriff court district?

Section C

7 Is the defender a British limited company with a place of business in the sheriff court district? (The sheriff clerk can tell you what

towns and villages are in the sheriff court district.)

yes / no / don't know

8 (If the answer to 7 is "no" or "don't know".) As far as you are aware, what type of body is the defender; what links does it have with the sheriff court district?

Section D

9 Apart from any links which the defender may have, what links does the claim have with the sheriff court district?

Some comments on this series of questions would seem to be called for. In Section A, there may not logically be any justification for allowing the would-be pursuer to answer "don't know". But in practice it may well be that by including a "don't know" possibility the court is more likely to ascertain the truth. "Don't know" responses, and any comments relating to them, can be followed up by the sheriff clerk or the sheriff. It should be clear from the chapters on the ordinary cause rules why the matters referred to in the various questions may be of relevance. The central personal connecting factor in the new rules of jurisdiction is of course domicile, but in a series of questions designed for laymen use of the word "domicile" did not seem advisable. In Section B the writer concentrated on "residence" instead. And in Section C references to "incorporation", to "registered offices" and to "central management and control" would not have been appropriate.

So far as Section D is concerned, it is appreciated that if in any action jurisdiction can be, and is, based on the defender being

domiciled in the sheriff court district, the other links which the claim may have with the sheriff court district will not affect the court's jurisdiction. But attempting to explain grounds of jurisdiction to the would-be pursuer would clearly not be appropriate, and his providing an answer to the question in Section D should not be difficult. Another point worth making is that the official forms only provide for the claim to be made against one defender. As a result in the above questions no account has been taken of the possibility of there being more than one defender.

In concluding it should be emphasised that the writer fully appreciates that the questions do not specifically cover all the points relating to jurisdiction which may be of relevance. Had the series of questions done so, it would of course have been not only significantly longer but also, to use Sheriff Principal Macleod's description of the provisions of the Act, "perplexing"¹⁸⁷. The writer has taken account of the nature of most small claims, and in particular the fact that they are generally brought against defenders domiciled in the sheriff court district. He has tried to produce a set of questions which strike a balance, which provide answers of significant value to the court without intimidating the would-be pursuer.

9 Court of Session proceedings: specific comments

Depending on their subject matter, proceedings are begun in the Court of Session by means of either a summons or a petition. In 1986 those responsible for revising the Rules of Court appreciated the desirability of the Rules taking account of the provisions of the Convention and Act and requiring particular averments to be made in summonses. As a result Rule of Court 70(1)(c) was introduced on 1¹⁸⁸ January 1987. It provided:

A condescendence shall include averments stating -

(i) the domicile of the defender (to be determined in accordance with sections 41 to 46 of, and articles 52 and 53 of Schedule 1 to, that Act);

(ii) the ground of jurisdiction of the court, unless jurisdiction would arise only if the defender prorogated the jurisdiction of the court (without contesting jurisdiction);

(iii) where appropriate, whether there is reason to believe that there exists an agreement prorogating the jurisdiction of a court in a particular country; and

(iv) whether proceedings involving the same cause of action are in subsistence between the parties in England, Wales, Northern Ireland or another Contracting State.

¹⁸⁹
The rule was then amended with effect from 3 August 1987. Part (i) was deleted, the remaining parts were renumbered and part (iv) was amended to read:

(iii) whether proceedings involving the same cause of action are in subsistence between the parties in a country to which the Convention in Schedule 1 to the Civil Jurisdiction and Judgments Act 1982 applies, unless the court has exclusive jurisdiction.

There has been no further amendment of the rule. No equivalent rule applying to proceedings begun by petition was introduced on 1 January 1987. But on 3 August 1987¹⁹⁰ rule 191 (aa) was introduced into the

Rules of Court. It provides:

The narrative of the petition shall include a paragraph stating -

(i) the ground of jurisdiction of the court, unless jurisdiction would arise only if the respondent prorogated the jurisdiction of the court (without contesting jurisdiction);

(ii) where appropriate, whether there is reason to believe that there exists an agreement prorogating the jurisdiction of a court in a particular country; and

(iii) whether proceedings involving the same cause or matter are in subsistence between the parties in a country to which the Convention in Schedule 1 to the Civil Jurisdiction and Judgments Act 1982 applies, unless the court has exclusive jurisdiction.

There has been no amendment of this rule. The first point which should be made is that there is no less justification for having such rules in the context of petitions than for having them in the context of summonses. The three schemes of jurisdiction in the Act - the Convention, Schedule 4 and Schedule 8 - all apply in principle to all proceedings within their subject matter scope, regardless of whether the document instituting the proceedings is called a summonses, a petition or an initial writ. It is true that the terminology used in the English language version of the Convention and in Schedules 4 and 8 is associated by the Scottish reader with summonses and initial writs rather than with petitions. But the Convention is undoubtedly applicable to all types of proceedings.

Certain legal systems have categories of proceedings similar to that of proceedings begun by petition in Scotland. In Germany, for example, there is Freiwillige Gerichtsbarkeit. But it is not the purpose of the Convention to regulate civil jurisdiction only where the proceedings are in a particular form. That would be inappropriate if only because the various systems categorise proceedings in

different ways. Certain proceedings begun by petition in Scotland would not fall within the Freiwillige Gerichtsbarkeit in Germany, and vice versa. It should be said that art 25, which begins Title III on Recognition and Enforcement, states that "'judgment' means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called...." An interlocutor in which the prayer of a petition is granted is therefore a judgment for the purposes of the rules of recognition and enforcement, and Title II is concerned with jurisdiction in proceedings the judgment at the end of which could be enforced in terms of Title III.

A further point which can be made here is that many sets of proceedings begun by petition in the Court of Session fall outside the subject matter scope of one or more of the schemes of jurisdiction in the Act.¹⁹¹ In the family law area, art 1 of the Conventions excludes from their subject matter scope inter alia proceedings for custody and proceedings relating to succession. Custody, it should be said, is not specifically referred to in art 1. But it is there provided that the Conventions "shall not apply to the status or legal capacity of natural persons", and the European Court would, if called upon, hold that custody matters come within this category. In Scots law, custody is not a question of status, but of course the European Court would give the expression a "Community" interpretation. It would be significantly influenced by the way in which custody is generally classified in the Continental contracting states.

Article 57 of each Convention, it should be said, provides that

[t]his Convention shall not affect any conventions to which the

Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.

One effect of this is that if the 1980 Hague Convention on the Civil Aspects of International Child Abduction¹⁹² enables particular proceedings to be brought in the Court of Session, even if the subject matter of the proceedings falls within the scope of the Brussels and Lugano Conventions, jurisdiction is determined by the Hague Convention rather than by the Brussels and Lugano Conventions. The other convention given the force of law by the Child Abduction and Custody Act 1985, the 1980 Council of Europe Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children, is as its name suggests concerned with recognition and enforcement rather than with jurisdiction. Again, where recognition or enforcement is sought in terms of this convention, its provisions, rather than those of the Brussels and Lugano Conventions, will be applicable.

So far as proceedings relating to succession are concerned, "wills and succession" are specifically mentioned in art 1 of the Conventions. But it should also be said that trusts fall within the subject matter scope of the Conventions. After all, art 5(6) contains a rule of special jurisdiction applicable in the case of certain actions concerning trusts. There is clearly scope for argument here as to whether petitions relating to certain trusts, on account of the trust's close connection with the disposal of an individual's property on his death, fall within the "succession" category in art 1.

In the commercial area, art 1 excludes from the subject matter scope

of the Conventions "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings". Many petitions in the Court of Session concern company matters, but this form of words does not make it at all clear precisely which fall within the subject matter scope of the Conventions. Just what are analogous proceedings? And the Scottish practitioner cannot always be totally sure if his petition concerns a judicial arrangement or a composition. The European Court would interpret these words in the light of what it saw as the policy of the Brussels Convention, and the general approach of the legal systems of the contracting states.¹⁹³ Most of these legal systems are of course very different from the Scottish one. The reference to insolvent companies does suggest that in principle proceedings relating to the winding-up of solvent companies are within the scope of the Convention, but of course the proceedings which the petitioner wishes to bring may come within the category of "judicial arrangements, compositions and analogous proceedings". If he turns to the Scottish textbook on the Convention and Act, he is not likely to find an answer to his question.¹⁹⁴

Schedule 4 to the Act does not apply to any proceedings the subject matter of which falls outside the scope of the Conventions. And s 17 provides that it

shall not apply to proceedings of any description listed in Schedule 5 or to proceedings in Scotland under any enactment which confers jurisdiction on a Scottish court in respect of a specific subject-matter on specific grounds.

Schedule 5 lists inter alia proceedings under the Companies Acts and proceedings in which, by virtue of art 57 of the Brussels and Lugano

Conventions, jurisdiction is regulated by a special convention rather than by the Brussels and Lugano Conventions. Jurisdiction in many family law actions, and in many commercial proceedings, is regulated by special statutory provisions within the United Kingdom. Many petitions in the Court of Session will therefore be excluded from the scope of Schedule 4 by virtue of Schedule 5 and / or the reference to proceedings in Scotland in s 17 itself.

So far as Schedule 8 is concerned, its scope is not restricted to proceedings within the subject matter scope of the Conventions and, for example, actions concerning wills and succession are as a general rule subject to Schedule 8. But s 21 provides that Schedule 8 does not affect

(a) the operation of any enactment which confers jurisdiction on a Scottish court in respect of a specific subject-matter on specific grounds;

(b) without prejudice to the foregoing generality, the jurisdiction of any court in respect of any matter mentioned in Schedule 9.

As a result many proceedings begun by petition in the Court of Session are not subject to Schedule 8. The thirteenth item listed in Schedule 9 is this: "Proceedings which are not in substance proceedings in which a decree against any person is sought." This item has no counterpart in Schedule 5, and precisely which types of proceedings fall into this category is unclear. In connection with this matter Anton states that¹⁹⁵

the Scottish courts have jurisdiction, especially in petition procedure, in proceedings where there is not necessarily a contradictor and where it would be inappropriate, if not impracticable, to apply the ordinary rules of jurisdiction in patrimonial matters.

That does not, of course, answer all of the questions which may be asked here. But the question of the circumstances in which a respondent is not a contradictor is outside the scope of this thesis. So indeed are all the questions which can be raised concerning the precise meaning of the provisions excluding types of proceedings from the scope of a scheme of jurisdiction. In a consideration of the most appropriate rules of court relating to averments of jurisdiction in petitions, the two useful points which can be made in the light of the foregoing paragraphs are these: (1) Jurisdiction in certain types of proceedings which are begun by petition may not be subject to any, or may only be subject to one or two, of the schemes of jurisdiction in the 1982 Act; the Conventions alone, or Schedule 8 alone, might, for example, be applicable. (2) Precisely how certain of the exclusions set out in art 1 of the Conventions and in Schedules 5 and 9 of the Act should be interpreted is something of a mystery.

It would not be appropriate for the rules of court to set out what averments should be made in the case of each type of petition which may be presented to the Court of Session. This would take up an excessive amount of space and would cover many types of petition which are rarely presented. Moreover it would in effect require unsatisfactory predictions on the part of the Court of Session Rules Council as to how particular provisions of the Brussels Convention would be interpreted by the European Court, and how various words and phrases in Schedules 5 and 9 would be interpreted by the Court of Session. But there should certainly be borne in mind by those drafting any fresh rules of court the writer's two points and in addition the possible bewilderment of practitioners in this area in

general and the possibility of the person drafting a particular petition wrongly believing either that the Act as a whole is for one reason or another inapplicable to petitions or that his particular petition falls outside the scope of the Act as a whole. This matter will be referred to again below.

So far as the forms of words of the rules set out at the beginning of this chapter are concerned, various criticisms can be made. On account of the similarities between the two sets of rules, it is appropriate for them to be considered together. With regard to the old part (i) of the rule for actions begun by summons, at least three points can be made. Firstly, its scope, like that of the equivalent sheriff court rules, appeared to extend to all civil actions. But as in the case of the sheriff court rules, there was no other need for it to apply to category (ii) actions, far less category (iii) ones. Secondly, the rule referred to "the domicile" and "the defender". But a defender may have more than one domicile, and an action may have more than one defender. And thirdly, reference was made to "that Act". But neither 70(1)(a) nor 70(1)(b) referred to any statute and it seemed to be left to the practitioner to work out from the context that the Act in question was the Civil Jurisdiction and Judgments Act 1982.

Turning to the new part (i) of the rule for actions begun by summons, and part (i) of the rule for proceedings begun by petition, it is submitted that the words "unless jurisdiction would arise only if the respondent prorogated the jurisdiction of the court (without contesting jurisdiction)" are inappropriate. If the court would not otherwise have jurisdiction, but it is hoped that the defender will

appear and not contest jurisdiction - thereby giving the court jurisdiction - this should be required to be stated in the condescence. Otherwise the court will not know if the pursuer had considered the question of jurisdiction and, if he had, why he believed that he could bring the action in the Court of Session. A further point here is that, in the context of an action where there has not been a jurisdiction agreement in terms of art 17 of the Conventions and / or Sched 4, and / or rule 5 of Sched 8, "to prorogate the jurisdiction" means "to appear and not contest jurisdiction".¹⁹⁶ As a result the words "(without contesting jurisdiction)" are superfluous.

So far as the next part of each of the rules is concerned, the thinking behind the words "where appropriate" is unclear. Perhaps it was thought that an averment, positive or negative, would be appropriate in all category (i) and category (ii) actions. Perhaps it was thought that an averment would be appropriate in the case of actions concerning commercial contracts. Or perhaps those drafting the new Rules of Court had other thoughts about when an averment would be appropriate. Nor are the words "a court in a particular country" particularly helpful. The reader might wonder whether these words signify something more than the shorter and simpler expression "another court" would do.

The final part of the rule does not begin - has never begun - with the words "where appropriate". The rule would therefore appear to be applicable irrespective of whether the action, on account of its subject matter, falls within category (i), category (ii) or category (iii). But it is quite fatuous for an averment concerning identical

actions to be required in category (iii) actions.¹⁹⁷ Whether the provision need be interpreted to this effect is a question along the same lines as that which arose in connection with the parallel sheriff court rules; the points made there in relation to the interpretation of delegated legislation need not be repeated here. In the original version of the provision applicable in the context of actions begun by summons, reference was made to "another Contracting State". But what the states in mind would be contracting to was not explained.

The present version of this part of the rule is more satisfactory, specifically mentioning Sched 1 to the Act. But as was explained above in the context of the sheriff court rules, on account of the lack of an art 21 in Sched 4, or an equivalent provision in Sched 8, it is not essential for the court to be made aware of an identical action elsewhere in the United Kingdom. So if it is only identical actions in certain courts which the pursuer or petitioner is to be required to mention, it should be those in courts of other contracting states. But of course, as in the sheriff court context, what is simplest is for there to be a short averment that there are no identical actions in any other court.

The last part of the rule now concludes with the words "unless the court has exclusive jurisdiction". It is submitted that these words ought not to be there. As was considered above,¹⁹⁸ there is more than one reason why two or more courts might have exclusive jurisdiction in a particular action. It is just as important for the court to be made aware of any identical action elsewhere in the exclusive jurisdiction context as it is in, for example, the special

jurisdiction context.

Three further points concerning the present rules are these. Firstly, it is curious that the rules appear to require in each summons and petition an averment about the possibility of identical proceedings elsewhere. But an averment about the possibility of a prorogation agreement should only be made "where appropriate". This is curious because in the context of prorogation agreements, but not in that of identical actions, the Jenard Report makes it clear that the court has a duty - in the event of an action being undefended - to investigate matters for itself.¹⁹⁹ In considering appropriate rules of court for sheriff court ordinary causes, it was only after some hesitation that the writer considered that pursuers should be required to make an averment about identical actions as well as about prorogation agreements.

The next point is that the writer's understanding is that in practice counsel generally, in drafting summonses which will begin Court of Session proceedings, include averments, positive or negative, concerning the possibility of there being an identical action elsewhere or a relevant prorogation agreement. So not only are the sheriff court and the Court of Session rules on these matters different; the practice in the Court of Session is also different from that in the sheriff courts. It is submitted that there is no justification for these differences.

Finally, in late 1987 - in other words after the original Rule of Court 70(1)(c)(i) was deleted - the present writer wrote to the junior counsel to the Lord President, setting out the arguments for a pursuer or petitioner in proceedings within the subject matter scope

of the Conventions to be required to aver the defender's domicile in the summons or petition. But he failed to convince those responsible that the provision which had been deleted should be restored. It appears to be the view of the Rules Council that if, when he is seeking decree in absence, a pursuer informs the court of what he considers the defender's domicile to be, the court is being given as much assistance as it need be given in the carrying out of the duty imposed on it by the Act.

Having considered the present rules, it is now appropriate to suggest fresh rules. It is submitted that, so far as proceedings begun by summons are concerned, the substance of the rules ought to be the same as in the context of ordinary causes in the sheriff courts. There is no need to repeat here the arguments for the phraseology favoured by the writer. Retaining where possible the format and wording of the present rules, it is suggested that the new rules should read as follows:

(i) A condescendence shall include averments stating the ground of jurisdiction of the court.

(ii) (a) In any cause which, by reason of its subject matter, falls within the scope of the 1968 Brussels Convention and 1988 Lugano Convention, whether or not jurisdiction is determined by the provisions of either Convention, the condescendence shall, in the event of one or more defenders being domiciled in Scotland, include averments to this effect; in the event of one or more defenders being domiciled in England and Wales or in Northern Ireland but not in Scotland, the condescendence shall include averments to this effect;

in the event of one or more defenders being domiciled in a state to which one or both of the said Conventions applies, but not in the United Kingdom, the condescendence shall include averments to this effect; in the event of one or more defenders not being domiciled in any of the states to which either of the said Conventions applies, the condescendence shall include averments to this effect.

(ii) (b) For the purposes of part (a), domicile shall be determined in accordance with sections 41 to 46 of, and articles 52 and 53 of Schedule 1 to, the Civil Jurisdiction and Judgments Act 1982.

(iii) In any cause which, by reason of its subject matter, falls within the scope of the 1968 Brussels Convention and 1988 Lugano Convention, whether or not jurisdiction is determined by the provisions of either Convention, the condescendence shall include an averment about whether or not there may be, as far as the pursuer is aware, at the date of the bringing of the action or thereafter, pending before another court a cause involving the same cause of action and between the same parties.

(iv) In any cause which, by reason of its subject matter, falls within the scope of the 1968 Brussels Convention and 1988 Lugano Convention, and / or the rules of jurisdiction in Schedule 8 to the Civil Jurisdiction and Judgments Act 1982, whether or not jurisdiction is determined by the provisions of either Convention and / or Schedule 8, the condescendence shall include an averment about whether or not there may be in existence, as far as the pursuer is aware, any agreement prorogating jurisdiction over the subject matter of the cause to another court.

Turning to the question of appropriate rules in the context of petition procedure, it will be recalled that there is a significant number of types of petitions which on account of their subject matter fall within the scope of only one or two of the Act's three schemes of jurisdiction. Jurisdiction may be determined in part by statutory rules specifically concerned with the subject matter of the petition. Precisely which types of petitions are within the scope of which schemes of jurisdiction is far from clear, and the average practitioner may be somewhat confused. He may, in fact, not appreciate all the difficulties. Of course certain types of actions begun by summons do not fall within the scope of all three schemes of jurisdiction, and here too matters are not always clear cut. But the number of types of petitions outside the scope of at least one scheme, and the number of problems of classification in the petition procedure context, are considerably larger.

It can be argued that the practitioner's additional difficulties should not be taken into account in the preparation of the rules of court; he should simply be expected to make the appropriate averments in the light of the correct categorization of the proceedings. But it is submitted that this approach would be somewhat naive, particularly as one of the purposes of the rules is to enable the court to have before it material of use to it in the carrying out of its new duty. In a significant number of cases the practitioner's categorization would probably be wrong. Another approach would be for the rules of court to provide that in the narrative of all petitions there should be statements concerning the possibility of a relevant prorogation agreement and / or an identical action elsewhere and also the

domicile(s) of the respondent(s) in terms of the Act. But as there are certain types of proceedings clearly outside the scope of the Act as a whole, this approach would be far from satisfactory.

It is submitted that in the circumstances the most appropriate course would be for it to be provided that in the narrative of each petition it should be stated which of the three schemes of jurisdiction in the Act includes / include in its / their subject matter scope the subject matter of the proceedings. Such a rule would in principle require the practitioner drafting the petition to consider the applicability of each of the schemes of jurisdiction. It would also have the effect of the court having before it material of significant value to it in the carrying out of its duty in the event of the respondent failing to appear. For both these reasons it would increase the likelihood of the court coming to the correct decision with regard to jurisdiction. Of course the petitioner's statements could not simply be accepted by the court, but they would provide it with a good starting point.

The rule which the writer has in mind would no doubt initially be intensely disliked by practitioners. But it would not be expecting an unreasonable amount of work on their part. For it is a trite point that a practitioner ought always to consider the question of jurisdiction before bringing proceedings, and one cannot fully explain the jurisdiction of the court in particular proceedings without reference to all three of the schemes of jurisdiction in the Act. Because of the priority of the Conventions, it would clearly be insufficient to consider the subject matter scope of Schedule 8 alone. And because the Conventions generally leave it to domestic

rules of jurisdiction to determine the particular courts with jurisdiction, it would not be sufficient to consider the subject matter scope of the Conventions alone. Styles would be gathered together by practitioners, and textbooks and stylebooks would in time give guidance on this matter. So the rule would not be the bane of practitioners' careers.

Two further points are these. It should be made clear in the rule that the paragraph on jurisdiction should make reference to all three schemes even if the person drafting the petition considers that one of the schemes is inapplicable for some reason. Consideration should, for example, be given to the subject matter scope of the Conventions even if it is considered that because of the purely Scottish nature of the proceedings the Conventions are irrelevant. It should also be made clear by the rule that, in addition to the statements on the three schemes of jurisdiction, the paragraph should contain statements applying the relevant rules of jurisdiction - in other words, linking the proceedings with the court.

Finally, so that the court is given real assistance in its task, a statement concerning a particular scheme of jurisdiction should not, for example, simply state: "The proceedings fall outside the subject matter scope of Schedule 8 to the Civil Jurisdiction and Judgments Act 1982." An acceptable form of words would be: "The proceedings are for regulating the custody of a child and therefore, on account of s 21 of, and para 2 of Schedule 2 to, the Civil Jurisdiction and Judgments Act 1982, fall outside the scope of Schedule 8 to the said Act." But it is perhaps unnecessary for this point specifically to be made in the rules of court.

Following as far as possible the wording of the rules applicable to proceedings begun by summons, it is suggested that the new rules applicable in the context of petition proceedings should read as follows.

(i) The narrative of the petition shall contain a paragraph stating the ground of jurisdiction of the court; without prejudice to the generality of the foregoing, and whether or not in the circumstances of the proceedings jurisdiction is determined in whole or in part by the provisions of (a), (b) or (c), there shall be included in the said paragraph statements about whether or not the subject matter of the proceedings falls within the scope of (a) the 1968 Brussels Convention and 1988 Lugano Convention, (b) Schedule 4 to the Civil Jurisdiction and Judgments Act 1982 and (c) Schedule 8 to the said Act.

(ii) (a) In any proceedings which, by reason of their subject matter, fall within the scope of the 1968 Brussels Convention and 1988 Lugano Convention, whether or not jurisdiction is determined by the provisions of either Convention, the narrative of the petition shall, in the event of one or more respondents being domiciled in Scotland, include statements to this effect; in the event of one or more respondents being domiciled in England and Wales or in Northern Ireland, but not in Scotland, the narrative of the petition shall include statements to this effect; in the event of one or more respondents being domiciled in a state to which one or both of the said Conventions applies, but not in the United Kingdom, the narrative of the petition shall include statements to this effect; in the event of one or more respondents not being domiciled in any of

the states to which either of the said Conventions applies, the narrative of the petition shall include statements to this effect.

(ii) (b) For the purposes of part (a), domicile shall be determined in accordance with sections 41 to 46 of, and articles 52 and 53 of Schedule 1 to, the Civil Jurisdiction and Judgments Act 1982.

(iii) In any proceedings which, by reason of their subject matter, fall within the scope of the 1968 Brussels Convention and 1988 Lugano Convention, whether or not jurisdiction is determined by the provisions of either Convention, it shall be stated in the narrative of the petition whether or not there may be, as far as the petitioner is aware, at the date of the presenting of the petition or thereafter, pending before another court proceedings involving the same matter and between the same parties.

(iv) In any proceedings which, by reason of their subject matter, fall within the scope of the 1968 Brussels Convention and 1988 Lugano Convention, and / or the rules of jurisdiction in Schedule 8 to the Civil Jurisdiction and Judgments Act 1982, whether or not jurisdiction is determined by the provisions of either Convention and / or Schedule 8, it shall be stated in the narrative of the petition whether or not there may be in existence, as far as the petitioner is aware, any agreement prorogating jurisdiction over the subject matter of the proceedings to another court.

10 The granting of decrees in absence: introduction

100

It has already been stated that it is not clear precisely when in any proceedings the new duties imposed on the courts arise. It may well be that they arise before decree in absence is sought, and that as a result the rules of court ought to make provision for a hearing on the questions of jurisdiction and intimation to the defender / respondent to take place at the end of a particular period following on the commencement of the proceedings. But as a result of the present writer's correspondence with the then junior counsel to the Lord President, it became clear to him that the junior counsel, and in fact those advising the Lord President as a whole, did not consider that it would be appropriate for the rules of court now to contain provisions for special hearings.

The view of the Lord President's advisers is that, when it is asked to grant decree in absence, the court can at that stage fulfil what duties are now incumbent upon it; it is adequate for the rules of court relating to decree in absence to take account of the courts' new duties. It is submitted that this is a matter to which those responsible for the rules of court ought to give further consideration. It is appreciated that there is a lack of case law, and that the European Court cannot simply be asked by a national court - or by the executive in a contracting state - to give a ruling on a matter such as this. But it is the writer's view that this matter ought to be pursued by those responsible. For one thing, there could unofficially be sought the advice of those who are working for the European Court or the European Commission and are concerned with the implementation of the Brussels Convention in the contracting

states. It could also be ascertained what approach to the whole matter is taken in the other contracting states.

It is worth noting that the Maxwell Report stated that²⁰¹

it may be necessary for the implementing statute to state expressly that the court shall have power to declare of its own motion at any stage in the procedure that it has no jurisdiction.

No such provision was included in the Act, but it is submitted that, if the courts are not to be required to address themselves to the questions of jurisdiction and intimation to the defender / respondent prior to decree in absence being sought, the Court of Session and sheriff court rules ought nevertheless to state expressly that if the court becomes aware at any stage that particular proceedings should be dismissed or sisted on account of the relevant provisions of the Conventions and Act, it should straight away do so.

It seems appropriate at this point to consider the relevant parts of the rules of court concerning decrees in absence. So far as the sheriff courts are concerned, on 1 January 1987 additions were made to the ordinary cause and summary cause rules.²⁰² Rule 21 of the Ordinary Cause Rules is concerned with decrees in absence. Para (1) concerns the relevant procedural steps, and para (2) lists the types of proceedings in which decree in absence in terms of para (1) cannot be sought. As a result of the amendment to the rules which came into effect on 1 January 1987, the pre-existing rules continue to be applicable in any cause not falling within one of the categories in para (2)

provided that the sheriff shall not grant decree in the cause unless it appears *ex facie* of the initial writ that a ground of jurisdiction exists under the Civil Jurisdiction and Judgments Act 1982.

In the case of a defender domiciled in another part of the United Kingdom or in another Contracting State, the sheriff shall not grant decree in absence until it has been shown that the defender has been able to receive the initial writ in sufficient time to arrange for his defence or that all necessary steps have been taken to that end; and for the purposes of this sub-paragraph -

(i) the question as to whether a person is domiciled in another part of the United Kingdom shall be determined in accordance with sections 41 and 42 of the Civil Jurisdiction and Judgments Act 1982;

(ii) the question as to whether a person is domiciled in another Contracting State shall be determined in accordance with Article 52 of Schedule 1 to that Act; and

(iii) the term "Contracting State" has the meaning assigned to it by section 1 of that Act.

203

A new rule, rule 21A, was added. It reads:

Where in any civil proceedings (including proceedings for divorce, separation and aliment and actions for custody of children), the initial writ has been served in a country to which the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters dated 15 November 1965 applies, decree shall not be granted until it is established to the satisfaction of the sheriff that the requirements of Article 15 of that Convention have been complied with.

In the **Summary Cause Rules** there are two sets of provisions concerning decrees in absence. The provisions concerning decree in absence in proceedings for which no special provision is made are to be found in rule 18; those concerning decree in absence in actions for payment of money are to be found in rule 55. Since 1 January 1987²⁰⁴ rule 18 has contained the proviso that the sheriff shall not grant decree in the cause unless it appears ex facie of the summons that a ground of jurisdiction exists under the Civil Jurisdiction and Judgments Act 1982. The proviso is followed by provisions in rules 18(8) and 18A which are in substance identical to the provisions of the Ordinary Cause Rules set out above concerning the giving of notice to the defender (including the rule referring to the 1965

Hague Convention).

105

What was added to rule 55 differs from what was added to rule 18 in that it does not include the paragraph now to be found in rule 18 (and as rule 21A of the Ordinary Cause Rules) concerning the 1965 Hague Convention. But at the beginning of Part II of the Summary Cause Rules, which contains the special rules relating to particular types of proceedings, rule 49 states:

The provisions of Part I of these rules shall apply to the summary causes for which special rules are provided in this Part, except in so far as these provisions are inconsistent with the special rules.

So regard should be had to art 15 of the 1965 Hague Convention in summary cause actions for payment of money as well as in other types of summary causes.

None of these provisions appears to have been amended subsequent to its coming into force.

106

In the **Small Claims Rules**, rule 10(1) provides that if the defender does not lodge a form of response and the pursuer takes certain steps, decree may be granted. It is provided by para (4) that

[t]he sheriff shall not grant decree under paragraph (1) of this rule unless it is clear from the terms of the summons that a ground of jurisdiction exists.

The rules themselves contain no provision relating to the need for the defender to have been given sufficient notice of the proceedings, or to the 1965 Hague Convention. But rule 2(2) of the **Small Claims Rules** provides:

The provisions of the Summary Cause Rules specified in Appendix 3 to

these rules shall apply to a small claim insofar as not inconsistent with these rules.

Rules 18(8) and 18A of the Summary Cause Rules are listed in Appendix 3, so they are effectively incorporated into the Small Claims Rules. As a result the same approach to decrees in absence in the context of the Brussels Convention is taken in all three types of proceedings in the sheriff court: ordinary causes, summary causes and small claims.

So far as the **Court of Session** is concerned, there are of course separate sets of rules for proceedings begun by **summons** and for proceedings begun by petition. With regard to the first set of rules, on 1 January 1987²⁰⁷ there was introduced into rule of court 89 a provision that

[t]he motion enrolled for decree in absence shall state the ground of jurisdiction of the court.

²⁰⁸
On 3 August 1987 there were added to these words:

and the domicile of the defender (as determined by sections 41 to 46 to [sic] the Civil Jurisdiction and Judgments Act 1982) in so far as it is known to the pursuer.

²⁰⁹
Further amendment took place on 5 January 1988, and the provision now reads:

The motion enrolled for decree in absence shall state the ground of jurisdiction of the court and, in a cause to which the Civil Jurisdiction and Judgments Act 1982 applies, the domicile of the defender (as determined by the provisions of that Act) in so far as it is known to the pursuer.

No parallel **petition** procedure rule was introduced on 1 January 1987, but on 3 August 1987²¹⁰ there was inserted into rule of court 197 the following provision:

A motion to grant the prayer of the petition shall state the ground of jurisdiction of the court and the domicile of the respondent (as determined by sections 41 to 46 of the Civil Jurisdiction and Judgments Act 1982) in so far as it is known to the petitioner.

211

Amendment took place on 5 January 1988; the provision now reads:

A motion to grant the prayer of the petition shall state the ground of jurisdiction of the court and, in a cause to which the Civil Jurisdiction and Judgments Act 1982 applies, the domicile of the respondent (as determined by the provisions of that Act) in so far as it is known to the petitioner.

It is emphatically submitted that, particularly if no provision is to be made in the rules for the matters in question to be considered at an earlier stage, it is essential for the rules of court concerning the granting of decree in absence to include provisions relating to the verifying of the jurisdiction of the court and the ascertaining of the defender's / respondent's opportunity to enter the process. As has been seen in the context of the rules of court relating to averments of jurisdiction, the Act imposes certain duties on the court. On account of the superiority of statutes to rules of court found in statutory instruments, these duties undoubtedly exist whether or not they are referred to in the rules of court. But it is clearly in the interests of all concerned for them to feature in appropriate terms in the rules of court. And if the rules make no provision for hearings at an early stage in proceedings specifically to cover the jurisdiction of the court and the defender's / respondent's opportunity to enter the process, the duties should feature in the rules relating to the granting of decree in absence.

Of course if reference is to be made to the duties in the rules of court, it is imperative for the rules fully and accurately to cover

the whole of the court's duty. There should therefore now be considered the question of what changes of substance and of wording should be made to the present rules. There are clearly differences between the present sheriff court rules on the one hand and the present Court of Session rules on the other. As the duties imposed on sheriff courts are the same as those imposed on the Court of Session, the desirability of having different sets of rules is highly doubtful. The nature of the courts' new duties was considered above in the context of averments of jurisdiction in sheriff court ordinary actions; all that is necessary here is for there to be drafted, and commented on, the rules which will most efficiently enable these duties to be fulfilled.

II Decrees in absence in the sheriff courts

It seems appropriate to begin this section by questioning the value of incorporating into the Small Claims Rules the Ordinary Cause and Summary Cause Rules listed respectively in Appendices 2 and 3 of the Small Claims Rules. While the validity of the incorporation cannot be doubted, there is a danger that these provisions will be overlooked. They might moreover be regarded as in some way less important than the rules to be found in the Small Claims Rules themselves. Where the rules are designed to facilitate compliance with obligations contained in an international convention, the result could be particularly unfortunate.

As the approach taken in the Ordinary Cause Rules, the Summary Cause Rules and the Small Claims Rules is the same, and as the writer sees no justification for there being taken different approaches, it is necessary only to consider the Ordinary Cause Rules. It will be clear that the writer is in favour of a rule to the effect that decree in absence should not be granted in any action until the verification of jurisdiction required by art 20 of the Conventions (and quite possibly also by art 20 of Sched 4 and rule 8 of Sched 8) has taken place. He has two principal criticisms of the present provisions of the Ordinary Cause Rules set out in Chapter 10. Firstly, the provisions appear to extend to all types of civil proceedings other than those in one of the categories in rule 21(2). Various types of subject matter outside the subject matter scope of the Act as a whole are not listed in rule 21(2).²¹² To require verification of jurisdiction in general in actions with one of these types of subject matter is unnecessary; in the case of actions outside the subject matter scope

of the Act there is no good reason for there to be changed the traditional approach of leaving questions of jurisdiction to be raised by the defender. And to require verification of jurisdiction in terms of the Act in such actions is obviously inappropriate.

The second criticism concerns the words "it appears ex facie of the initial writ". The writer of course very much doubts that simply by reading the initial writ the sheriff can fulfil the duty to verify jurisdiction now imposed on him. The provision should, it is submitted, rather contain words such as "he is satisfied". It has been suggested that the relevant rules are in fact ultra vires. Whether or not this is the case, particularly in the light of the "negative" way in which the rules are expressed, would appear to be a moot point. But what is undoubted is that if there is a conflict between the statutory provisions and the rules, the statutory provisions prevail. A discussion of the arguments for and against the rules being held to be ultra vires would seem to be of very limited value; discussing possible amendments to the rules is much more worthwhile.

But it should perhaps be mentioned that if the rules are ultra vires, they are ultra vires of the Civil Jurisdiction and Judgments Acts 1982 and 1991, not of the European Communities Act 1972. For the 1972 Act is concerned with the "rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the ²¹³Treaties", and what is meant in the Act by "Treaties" is, unless the context otherwise requires, one of the agreements listed or referred to in the Act or in an amending Act.²¹⁴ The Brussels and Lugano Conventions are not listed in the 1972 Act or in any amending Act.

Nor are they referred to. There is a reference to "a treaty ancillary²¹⁵ to any of the Treaties", but this concerns what are loosely speaking public law agreements. Had the Brussels Convention been such a treaty, the 1982 Act would have been unnecessary. Nor is this a case where the context requires otherwise; those responsible for the 1982 Act clearly did not think so.

An argument can be advanced for the rules of court being more specific than what the writer suggested above. It might be, for example that two affidavits on the question of jurisdiction should be required to be lodged prior to decree in absence being sought. There is now in the English High Court a rule to the effect that one affidavit should be lodged. Order 13, rule 7B states:

(1) Where a writ has been served....on a defendant domiciled in Scotland or Northern Ireland or in any other Convention territory the plaintiff shall not be entitled to enter judgment under this Order except with the leave of the Court.

(2) An application for leave to enter judgment may be made ex parte and shall be supported by an affidavit stating that in the deponent's belief-

(a) each claim made by the writ is one which by virtue of the Civil Jurisdiction and Judgments Act 1982 the Court has power to hear and determine

(b) no other court has exclusive jurisdiction within the meaning of Schedule 1 or under Schedule 4 to the Act to hear and determine such claim

.....

Of course one problem with this rule is that it does not take account of the situation in which the plaintiff wrongly believes that the defendant is not domiciled in another part of the contracting states. A rule requiring an affidavit in all applications for leave to enter judgment would appear to the present writer to be more satisfactory.

It is conceded that there would be much merit in having rules of court specifically requiring the lodging of two suitable affidavits along with any minute for decree. But on balance it is believed that it is more appropriate rather to have in each of the various sets of rules of court a simple - but suitably worded - statement to the effect that, before granting decree in absence, the court must be satisfied with regard to both its jurisdiction and the giving of the necessary notice to the defender / respondent. For one thing, it is not clear precisely what the European Court would consider to be adequate verification even in the common types of situations.²¹⁶ Moreover, because the factual backgrounds of actions vary enormously, it would not be appropriate for those responsible for the rules to think in terms of two affidavits being lodged in each action. In some actions the sheriff might feel that he could only do his duty if three affidavits were lodged, or if complementary submissions were made by the pursuer's solicitor, or if a parole proof on jurisdiction took place.

It is submitted that it would be more appropriate for guidance on what should be considered satisfactory to be included in Practice Notes. These Notes could be drafted in the light of consultations on the part of those responsible for drafting the rules with both officials of the European Commission and the European Court and also their opposite numbers in other contracting states. It is of course the writer's view that the various "ingredients" in jurisdiction, including the domicile of the defender, the lack of an identical action elsewhere and the lack of a prorogation agreement in favour of another court, should be referred to in the rules of court concerning

averments of jurisdiction. There would seem to be no need for these ingredients to be specifically mentioned again in the rules of court or Practice Notes concerning decrees in absence. The need for the points referred to at the stage of averring jurisdiction to be covered at the stage of seeking decree in absence should be clear.

Finally here, it is worth mentioning that the present rules do not specifically require a pursuer to make an averment in the initial writ relating to the defender's domicile. But as has been seen, whether or not a ground of jurisdiction exists in an action may depend on the domicile of the defender. The present writer finds it difficult to understand how, if the domicile of the defender is not referred to in the initial writ, it can be said that "it appears ex facie of the initial writ that a ground of jurisdiction exists". And it is not at all clear how, if he is not told about the domicile of the defender, the sheriff can fulfil the duty set out in the second part of the ordinary cause rule quoted above not to grant decree against a defender domiciled elsewhere in the contracting states until it has been shown that the defender has been given an opportunity to prepare a defence. And prorogation agreements and identical actions are relevant to jurisdiction or the exercise of jurisdiction; if nothing about these matters is included in an initial writ, how can it be said that it appears ex facie of the writ that jurisdiction exists?

Using as far as possible the forms of words used in drafting the suggested rules of court concerning averments of jurisdiction, it is therefore suggested that the last part of Ordinary Cause Rules, rule 21(1)(a) be amended to read:

provided that in any cause which, by reason of its subject matter, falls within the scope of the 1968 Brussels Convention and 1988 Lugano Convention, and/or Schedule 8 to the Civil Jurisdiction and Judgments Act 1982, the sheriff shall not grant decree in the cause unless he is satisfied that a ground of jurisdiction exists.

The question may be asked at this point: What would be the consequences of the court failing to carry out the duty imposed on it by art 20 para one of the Conventions, and granting decree in absence in an action in which it had no jurisdiction? This situation might arise, for example, in the case of an action in which jurisdiction is purportedly based on one of the grounds of exorbitant jurisdiction in Sched 8, and the defender is domiciled in another contracting state but not in the United Kingdom. It is commonly believed that in such a situation the pursuer would be unable to have the decree enforced in another contracting state. But this is in fact generally considered by the authorities not to be the case - or at any rate not to be likely to be the case.

The Conventions are of course designed to enable persons who have obtained decrees within the contracting states to have these decrees enforced in other contracting states in as straightforward a manner as possible. The number of circumstances in which a court in one contracting state can refuse to enforce a decree granted in another contracting state must clearly be kept to a minimum. In particular, as a general rule the court of the state where enforcement is sought should not be able to review the jurisdiction of the court which granted the decree; the contracting states have agreed on common

rules of jurisdiction and so any consideration of jurisdiction in a particular case would generally be inappropriate.

Articles 27, 28 and 29 of the Conventions are concerned with grounds on which a judgment granted in one contracting state can and cannot be refused recognition and enforcement in another. Article 34 para two states that an application for enforcement "may be refused only for one of the reasons specified in Articles 27 and 28". The one ground of refusal of recognition and enforcement which might be thought to be relevant in the present context is that in part (1) of art 27: "A judgment shall not be recognised if such recognition is contrary to public policy in the state in which recognition is sought". But art 28 para three provides that, subject to certain provisions which are of no relevance here,

the jurisdiction of the court of the State in which the judgment was given may not be reviewed; the test of public policy referred to in Article 27(1) may not be applied to the rules relating to jurisdiction.

Is it the case that, at any rate in the state in which enforcement is sought, there is no remedy for a defender against whom a decree was granted in absence on account of the failure of the court to fulfil its duty and verify its jurisdiction? If so, is there a lacuna in the Conventions? As we shall see later, there is a remedy for the defender who was not given an adequate opportunity to defend the action. But that is a somewhat different matter; we are concerned here with the situation where the defender knows that the court has no jurisdiction but, on account of art 20 para one of the Conventions, feels that there is no need for him to enter an appearance and point this out.

If there is no remedy for a defender in this situation, this can be seen as a weakness in the Conventions; it can be said that the Conventions are not doing enough to protect persons domiciled within the contracting states being sued in contracting states in which they are not domiciled.²¹⁷ But of course if the defender could bring up the whole issue of jurisdiction when enforcement is sought, it would be said that the free movement of judgments was being impeded.²¹⁸ Is there a satisfactory solution to this dilemma? The question is a difficult one, but it is submitted that there is an arguable case for the refusal of recognition and enforcement of a decree granted without there having been compliance with art 20 para one. In other words, a further ground of refusal should be added explicitly or implicitly to the list in art 27.

²¹⁹

But the view expressed in the Maxwell Report is the one most commonly expressed by writers on the Conventions:

A Scottish court is bound to recognise and enforce a judgment from another Contracting State even if that judgment was pronounced in ignorance or defiance of a prorogation agreement valid under Article 17 prorogating the jurisdiction of a Scottish court.

²²⁰

Anton states that "[t]his result....is a strange one, and the issue merits examination by the European Court". "[T]oo much", he believes, "should not be read into [art 34 para two]". The result postulated by the Maxwell Committee would indeed be unfortunate, but just how can it be avoided? How can a court in one contracting state legitimately consider the jurisdiction of the court in another contracting state which granted the decree enforcement of which is being sought? It is appreciated that the European Court favours the provisions of the Convention being given a purposive interpretation, but how could such

an interpretation of art 34 para two or any other provision be of assistance? Two arguments will very tentatively be put forward here.

The first argument is that a refusal of recognition and enforcement in the circumstances envisaged could be based on art 27(1); notwithstanding the terms of art 28 para three, recognition and enforcement could be held to be contrary to public policy in the state in which they were sought. The reasoning is as follows. In the state in which enforcement is sought, the enforcing of a foreign decree granted as a result of a breach of an obligation contained in an international convention would be contrary to public policy. And nothing in art 28 para three prevents the application of this rule of public policy.

With regard to the first part of art 28 para three, it is not the case that it is the jurisdiction of the court which is being reviewed; what is being reviewed is rather the fulfilling or non-fulfilling by that court of its duty to verify its jurisdiction. And, with regard to the second part of the paragraph, what is meant by "may not be applied to the rules relating to jurisdiction" is in fact "may not be used to justify refusal of recognition and enforcement of a decree granted in an action against a defender domiciled outside the contracting states in which jurisdiction was based on a local ground of exorbitant jurisdiction".

The policy of Title III of the Conventions is to have free movement of all decrees granted within the contracting states - including decrees granted against individuals domiciled outside the contracting states who were the "victims" of exorbitant rules of jurisdiction - ²²¹

and art 28 para three is simply designed to facilitate this policy. "[R]ules relating to jurisdiction" just means "rules of jurisdiction". This is clear from the French language text. The expression used there in art 28 para three is "règles relatives à la compétence"; in art 3 the expression "dispositions relatives à la compétence" simply means "rules of jurisdiction", and there is no reason to suppose that "règles relatives à la compétence" means anything different.

The above argument is only of application in the context of a state in which the enforcing of a foreign decree granted as a result of a breach of an obligation contained in an international convention would be contrary to public policy. But the availability of the following argument, the present writer's second argument, is not limited in this way. It is that art 34 para two, which of course provides that an "application [for enforcement] may be refused only for one of the reasons specified in Articles 27 and 28" should not be interpreted literally. It is clear from a reading of Title III of the Conventions that reasons for refusing enforcement also exist outside arts 27 and 28.

On account of art 31 para one, for example, enforcement should be refused if it would not be possible in the state in which the decree was granted. On account of the same provision, enforcement should be refused if the person seeking it is not an "interested party". If there is no compliance with the formalities required by arts 32 and 33, and 46 - 49, presumably enforcement can be refused. Other situations in which enforcement may be refused are referred to in textbooks on the Conventions.¹²¹ In this context, it is submitted, it

would not be altogether surprising if the European Court were to hold that a manifest failure on the part of the court which granted the decree to fulfil the obligation placed on it by art 20 para one of the Convention constituted grounds for refusing to enforce the decree. If the European Court considered that such a decision would be in the interests of justice, it would not regard itself as having its hands tied by the wording of the Convention.

One useful approach here might be to hold that in art 34 para two "application" meant "valid application", and if there had been a failure to observe a mandatory rule of the Convention - which might be the rule in art 20 para one concerning procedure prior to decree being granted or a rule in Title III relating to procedure subsequent to decree being granted - the application was not valid. In concluding this section it should be said that there is indeed the possibility of the approach of the Scottish courts to the implementation of art 20 para one being the subject of criticism by either the European Court or a foreign national court. The matter might also be raised with the British government by the European Commission or by a government of another contracting state. It is submitted that it is not a matter in which there is room for complacency.

Turning now to Ordinary Cause Rules, rules 21(1)(b) and 21A, there is indeed a need for rules concerning the court's duty to ensure that the defender has been given adequate notice of the proceedings. Of course it may well be that, on account of the words "shall stay the proceedings",¹²³ the matter ought to be considered prior to decree in absence being sought. But if it is not regarded as necessary for it

to be considered at an earlier stage, it should certainly be considered at the stage of decree in absence being sought. However as para three of art 20 of the Conventions loosely speaking takes priority over para two, it is submitted that the order of the present rules 21(1)(b) and 21A should be reversed.

Article 15 of the 1965 Hague Convention is in a sense incorporated into the Brussels and Lugano Conventions; but it is not incorporated into Schedules 4 and 8. So should it only be considered to be of potential relevance in actions within the subject matter scope of the Conventions? The answer, it is submitted, should be No. While consideration of the Hague Convention is outside the scope of this thesis, it is noted in passing that rule 21A specifically refers to certain types of proceedings clearly outside the scope of the Act as a whole. And on general principles the provisions of the Hague Convention should be applied in any action within their scope - whether or not it is within the subject matter scope of the Brussels and Lugano Conventions.²²⁴

The words "a country to which the Hague Convention....applies" might lead to a little puzzlement; there seems no need to deviate here from para three of art 20. What the present writer would suggest is for ordinary cause rule 21A to be given a new heading: "Verification of defender's opportunity to enter an appearance". The following modified form of the present rule 21A would appear as rule 21A(1):

In any proceedings in which the initial writ has been transmitted abroad in accordance with the provisions of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, decree in absence shall not

be granted until it is established to the satisfaction of the sheriff that the requirements of Article 15 of that Convention have been complied with.

It might be appropriate for a Practice Note to provide guidance on the circumstances in which a sheriff may consider that there has been compliance with the provisions of art 15 of the Hague Convention.

It is now suggested that the present rule 21(1)(b) be deleted (with rule 21(1)(a) being renumbered simply 21(1)) and that a significantly modified form appear as rule 21A(2). It should be made clear in the rule that it is only applicable if the action in question is a category (i) action. Schedule 8 contains no equivalent of art 20 para two of the Conventions. So in actions outside the subject matter scope of the Conventions in which use has not been made of the 1965 Hague Convention, the court is not required, at the stage of granting decree in absence, to consider whether or not the defender had an opportunity to prepare his defence. So long as service has taken place and the induciae have expired, and (assuming rule 8 of Sched 8 to be interpreted in the same way as art 20 para one of the Conventions) it is satisfied that it has jurisdiction, it can grant decree in absence.

Article 20 para two of the Conventions only applies where use has not been made of the 1965 Hague Convention. But there is apparently no similar restriction on the scope of art 20 para two of Sched 4; Sched 4 contains no equivalent of art 20 para three of the Conventions. As was noted earlier, the general view is that the words "Where a defendant domiciled in one Contracting State is sued in a court of

another Contracting State" should be considered as coming at the beginning of para two of art 20 in the Conventions; similarly, "Where a defendant domiciled in one part of the United Kingdom is sued in a court of another part of the United Kingdom" should be considered as coming at the beginning of para two of art 20 in Sched 4.

Because the schemes of jurisdiction are - at any rate as a general rule - not concerned with matters internal to a contracting state / United Kingdom law district, para two is considered as being inapplicable if the defender is domiciled in the state / law district of the forum as well as in another contracting state / law district. As a result it would not be possible for art 20 para two of the Conventions and art 20 para two of Sched 4 both to be applicable in the case of any one defender. It should also be said that although art 20 para two of the Brussels and Lugano Conventions and art 15 of the Hague Convention will never both be applicable in the case of any one defender, the same cannot be said about art 20 para two of Sched 4 and art 15 of the Hague Convention. For if the defender is domiciled in England and Wales but service takes place abroad in accordance with the provisions of the Hague Convention, it would appear to be the case that there should be compliance with both art 20 para two of Sched 4 and art 15 of the Hague Convention.²²⁵ A further point to note here is that the subject matter scope of Sched 4 is smaller than that of the Conventions.

One result of all this appears to the present writer to be that there would be much merit in art 20 para two of the Conventions and art 20 para two of Sched 4 being the subject of separate provisions in the rules of court.²²⁶ It is suggested that the new rule 21A(2) read as

follows:

(i) In any proceedings (a) which, by reason of their subject matter, fall within the scope of the 1968 Brussels Convention and 1988 Lugano Convention, (b) in which a defender is domiciled in another contracting state but not in the United Kingdom and (c) in which the initial writ has not been transmitted abroad to that defender in accordance with the Convention referred to in rule 21A(1), the sheriff shall not grant decree in absence against that defender until it has been shown that he has been able to receive the initial writ in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

(ii) In any proceedings (a) which, by reason of their subject matter, fall within the scope of Schedule 4 to the Civil Jurisdiction and Judgments Act 1982 and (b) in which a defender is domiciled in England and Wales or in Northern Ireland but not in Scotland or in another contracting state, the sheriff shall not grant decree in absence against that defender until it has been shown that he has been able to receive the initial writ in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

(iii) In this rule "domiciled" shall be construed as "domiciled in accordance with the provisions of the Civil Jurisdiction and Judgments Act 1982", and "contracting state" has the meaning assigned to it by s 1 of that Act.

12 Decrees in absence in the Court of Session

The first point which should perhaps be made in this chapter is that there was no good reason for there to be included on 1 January 1987 provisions applicable in the context of proceedings begun by summons but not in the context of proceedings begun by petition. As stated above, the Conventions and Sched 4 apply in principle irrespective of the name and nature of the document instituting the proceedings.²²⁷

Prior to the most recent amendment of the rule applicable to proceedings begun by summons, the writer pointed out to the junior counsel to the Lord President that the domicile of a natural person in another contracting state is, in terms of art 52 para two of the Conventions, a matter for the law of that state alone. (An exception to this rule has of course existed in the case of persons with a domicile of dependence.)²²⁸ He suggested that a reference to art 52 be included in the rule. But as the Conventions are incorporated into Scots law by the Act, and art 52 is to be found in Sched 1 to the Act, the 5 January 1988 amendment would appear to clear up this point.

It might be said that whereas the sheriff court rules relating to the verification of the jurisdiction of the court place a duty on sheriffs, the Court of Session rules appear to place a duty on practitioners. It is provided in effect that a sheriff must ask himself whether it appears ex facie of the initial writ before him that a ground of jurisdiction exists. But on the other hand it is provided that in Court of Session proceedings the person enrolling the motion for decree in absence must ascertain the ground of jurisdiction of the court. The thinking would appear to be that the

Court of Session judges are sufficiently well aware of their duty in terms of art 20 para one of the Conventions and Sched 4 and also of rule 8 of Sched 8. If the practitioner concerned states the ground of jurisdiction of the court and the domicile of the defender / respondent in the motion for decree / to grant the prayer of the petition, the judge can then without any difficulty fulfil his duty. But this is of course a matter which is seriously doubted by the present writer.

For one thing, the practitioner will already have set out the jurisdiction of the court in the summons or the petition. Why should he be required to do so again? Are his words more credible if they appear twice? The practitioner is unlikely to expand on his initial averments in his motion for decree / to grant the prayer of the petition. Moreover it cannot be said that he is supplying the court with the most up to date information. For in answering the question of whether there is jurisdiction over particular proceedings, the crucial point in time is when the proceedings were begun, not when it is sought to have them concluded.²²⁹

If the writer were asked simply to improve the present rule, he would first of all suggest that its subject matter scope be restricted in two respects. The first part of the rule, relating to the ground of jurisdiction of the court, should only apply to category (i) and category (ii) proceedings; the second part, relating to the domicile of the defender / respondent, should only apply to category (i) proceedings. For, as considered above, in category (iii) actions it is left to the defender / respondent to raise the matter of a lack of jurisdiction on the part of the court seised. And in actions outside

the subject matter scope of the Conventions, but inside that of Sched 8, the domicile of the defender will only be of relevance if it is loosely speaking central to the jurisdiction of the court, in which case it is required to be mentioned by the first part of the rule.

The writer would then wish to make the point that proceedings may have more than one defender / respondent, and each defender / respondent may have more than one domicile. The drafters of the present rules did not take account of these possibilities. What would be necessary would be a rule similar to that suggested in the context of averments of jurisdiction - where each defender / respondent had to be considered separately, and only the domicile "closest" to the forum needed to be referred to. While the importance of the domicile of the defender is being recognised in the Court of Session rules in a way which it is not in the sheriff court rules, the wording of the reference to that domicile is unsatisfactory.

But although various improvements in the drafting of the present rules could be made, the writer considers that the rules should be replaced by rules along the same lines as those to be found in the sheriff court rules, and with wording corresponding to that of the revised shheriff court rules which he is suggesting. It should be made clear in the rules that there is a duty incumbent on the court, and the rules should contain no requirement for those acting for a pursuer / petitioner to repeat in their motion what they have already set out in the summons / petition. It is suggested that the new rules applicable in the context of proceedings begun by summons and in that of proceedings begun by petition be as follows:

In any cause which, by reason of its subject matter, falls within the

scope of the 1968 Brussels Convention and 1988 Lugano Convention, and / or Schedule 8 to the Civil Jurisdiction and Judgments Act 1982, the Court shall not grant decree in absence unless it is satisfied that a ground of jurisdiction exists.

In any proceedings which, by reason of their subject matter, fall within the scope of the 1968 Brussels Convention and 1988 Lugano Convention, and / or Schedule 8 to the Civil Jurisdiction and Judgments Act 1982, the Court shall not grant the prayer of the petition unless it is satisfied that a ground of jurisdiction exists.

Unlike the sheriff court rules, the Court of Session rules contain no provisions based on paras two and three of art 20 of the Conventions and para two of art 20 of Sched 4. Of course the court is bound by these provisions whether or not they are referred to in the rules of court, but this does not seem to justify the present lack of any reference to them. It does not seem to be appropriate for procedural matters to be regulated purely by provisions of international agreements. It might also be said that the issues are effectively covered elsewhere in the rules of court, but it is submitted that this is just not the case.

Reference might be made to the rules of court concerning the induciae in a summons. It is now provided by rule of court 72 that in the case of citation in another part of Europe, the induciae are to be twenty-one days after the date of execution of service; in the case of citation outside Europe, the period will as a general rule be forty-²³⁰two days. Anton and Beaumont comment that rule 72 "reflects the requirements of Art. 20(2) of the 1968 Convention and of Art. 15 of

the 1965 Hague Convention...." But, it is submitted, in considering whether the defender has had an adequate opportunity to enter an appearance, the court should consider the whole circumstances of the case; the length of the induciae is just one factor.

Reference might also be made to rules of court 89 (concerning proceedings begun by summons) and 197 (concerning proceedings begun by petition). In rule of court 89 provisions concern the superseding of the extract of a decree, and the intimating of the interlocutor granting the decree, in the case of a defender outside the United Kingdom. Rule 89(d) provides:

Where a copy of the summons has been served on a defender outside the United Kingdom under Rule 74B and decree in absence has been pronounced against that defender because he has not entered appearance, the court may, on the motion of that defender, recall the decree and allow defences to be lodged if -

- (i) the defender, without any fault on his part, did not have knowledge of the summons in sufficient time to defend;
- (ii) the defender has disclosed a prima facie defence to the action on the merits;
- (iii) the motion is made within a reasonable time after the defender had knowledge of the decree; and
- (iv) the motion is not made after the expiry of one year from the date of the decree.

Part (i) is clearly of relevance in the present context. But it is submitted that this rule represents a totally unsatisfactory response to art 20 paras two and three. For one thing, rule 89(j) states:

The recall of any decree under this Rule shall be without prejudice to the validity of anything already done or transacted, or of any contract made or obligation incurred, under and in virtue of the decree recalled, or of any appointment made or power granted therein or thereby.

But, more fundamentally, what the provisions of the Conventions state is that where a defender has not been given adequate opportunity to

defend the action against him, it should not be allowed to proceed to decree. If it had simply meant that such a defender could have a decree against him recalled, it would have said so.

Article 27(2) of the Conventions is of relevance here. It provides that

[a] judgment shall not be recognised where it was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence.

Article 34 para two provides that an application for enforcement of a judgment "may be refused for one of the reasons specified in Articles 27 and 28". So, if a pursuer were to obtain in the Court of Session a decree in absence against a defender domiciled in another contracting state, and the court had taken no steps to comply with art 20 of the Conventions and ascertain that the defender had had an adequate opportunity to defend the action, in the event of the pursuer trying to enforce the decree in another contracting state he might find himself involved in proceedings which focused on art 27 para two. This would of course be an unsatisfactory state of affairs for all concerned. It would not be a happy day for the Court of Session if it were found, either by a national court of another contracting state or by the European Court, to have failed to set up machinery for the fulfilling of obligations imposed on it by the Brussels Convention.

It is worth mentioning that the wording of art 27(2) follows that of art 20 para two; "in sufficient time to enable him to arrange for his defence" forms part of both provisions. So it would seem that if the court in which proceedings are brought correctly applies art 20 para two, recognition and enforcement cannot be refused on the ground set

out in art 27(2). But what if, on account of art 20 para three, it is art 15 of the 1965 Hague Convention rather than art 20 para two of the Brussels and Lugano Conventions which is applicable? Might it be the case that the requirements of art 15 were correctly held by the first court to be satisfied, but the second court, the court in which recognition is sought, holds that on account of art 27(2) recognition should not take place?

The first point which should be made here is that, in applying art 27(2), the second court may, irrespective of any finding of relevance made by the first court, hold that the defender was not given adequate notice of the proceedings. The second court is not bound by a finding of the first court that there has been compliance with art 20 para two of the Brussels and Lugano Conventions or with art 15 of the Hague Convention. This was made clear by the European Court in Klomps v Michel²³¹ and then in Pendy Plastic v Pluspunkt²³². As the precise meaning of the words "in sufficient time" in art 20 para two and in art 15 is far from clear, disagreements between the two courts involved in a particular action are far from inconceivable.

On account of the parallel wording of the two provisions, a court in which recognition is sought could not hold (a) that there had been no need for the proceedings to be stayed by the first court in terms of art 20 para two but (b) that on account of art 27(2) the judgment should not be recognised. However, might there be circumstances in which art 20 para three and art 15, rather than art 20 para two, were applicable, where it would be appropriate for the court in which recognition is sought to hold (a) that there had been compliance with art 15 but (b) that nevertheless on account of art 27(2) the judgment

should not be recognised? In other words, if there was going to be reference to art 15 in the jurisdiction part of the Conventions, should there also have been reference to it in the recognition and enforcement part?

It would be most unfortunate if the European Court were obliged in a particular case to hold that the first court involved had properly fulfilled its duty in terms of art 20 - in particular in terms of art 20 para three - but the second court nevertheless was correct in holding that, on account of art 27(2), recognition should not take place. But it is the writer's view that the provisions concerned need not be, and in fact should not be, given an interpretation which allows this situation to occur. In art 15, para one sets out the general rule. This is that where a summons has been sent abroad in accordance with the Hague Convention, and the defender has not entered an appearance, decree in absence cannot be granted until it has been established (a) that service / delivery of the summons took place in terms of the provision and (b) that "the service or the delivery was effected in sufficient time to enable the defendant to defend". It is submitted that, on account of its particular wording, if it were held that there had been compliance with this provision in a particular action, it could not then be held by the same court that art 27(2) required the application for enforcement of the ensuing decree to be refused.

But matters are complicated by art 15 para two. This provides that, notwithstanding the provisions of para one, a state may declare that it is open to a judge to grant decree in absence "if all the following conditions are fulfilled -"

- (a) the document was transmitted by one of the methods provided for in this Convention,
- (b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document,
- (c) no certificate of any kind has been received, even though every reasonable effort has been made to obtain it through the competent authorities of the State addressed.

The United Kingdom has made a declaration in terms of art 15 para ¹³³ two. It is condition (b) which is significant in the present context. "[A]dequate", it is submitted, means "sufficient time to enable the defendant to arrange for his defence". This is (with the substitution of "the defendant" for "him") the form of words used in art 20 para two and in art 27(2). So if a court holds that the art 15 conditions have been satisfied, in the writer's opinion it cannot then hold that recognition of the ensuing decree should be refused on account of art 27(2). As a result if in any proceedings the Court of Session correctly applies either para one or para two of art 15, recognition of the resulting decree should not be refused in another contracting state on account of art 27(2). But, it is submitted, as the words central to art 15 para two and to art 27(2) are not identical, in any Notes for Guidance on the interpretation of the 1965 Hague Convention it might be considered appropriate for it to be pointed out that what the court of the state in which enforcement is sought may be asked to hold is that "the defendant was not duly served with the [summons] in sufficient time to enable him to arrange for his defence".

Rule 197(b), it should be said, contains a provision relating to petition procedure very similar to rule 89(d); rule 197(c) corresponds to rule 89(j).

In an attempt to avoid an unfortunate situation such as envisaged above, it is submitted in conclusion that there should be introduced into the Court of Session rules along the same lines as the modified sheriff court rules previously suggested. The rules concerning proceedings begun by summons would read:

(i) In any proceedings in which the summons has been transmitted abroad in accordance with the provisions of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, decree in absence shall not be granted until it is established to the satisfaction of the court that the requirements of Article 15 of that Convention have been complied with.

(ii) In any proceedings (a) which, by reason of their subject matter, fall within the scope of the 1968 Brussels Convention and 1988 Lugano Convention, (b) in which a defender is domiciled in another contracting state but not in the United Kingdom and (c) in which the summons has not been transmitted abroad to that defender in accordance with the Convention referred to in [the previous sub-rule], the court shall not grant decree in absence against that defender until it has been shown that he has been able to receive the summons in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

(iii) In any proceedings (a) which, by reason of their subject matter, fall within the scope of Schedule 4 to the Civil Jurisdiction and Judgments Act 1982 and (b) in which a defender is domiciled in England and Wales or in Northern Ireland but not in Scotland or in another contracting state, the court shall not grant decree in

absence against that defender until it has been shown that he has been able to receive the summons in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.

(iv) In this rule "domiciled" shall be construed as "domiciled in accordance with the provisions of the Civil Jurisdiction and Judgments Act 1982", and "contracting state" has the meaning assigned to it by s 1 of that Act.

Equivalent provisions would be introduced into the rules concerning proceedings begun by petition.

- 1 They were brought into force by SI 1986 No 2044.
- 2 Published as SI 1986 No 1941 and SI 1986 No 1946.
- 3 1987 SLT (News) 8 and 22.
- 4 Report of the Scottish Committee on Jurisdiction and Enforcement, HMSO.
- 5 A E Anton, Civil Jurisdiction in Scotland.
- 6 A E Anton and P R Beaumont, Civil Jurisdiction in Scotland: Supplement.
- 7 In addition to the various textbooks on the Convention and Act, several hundred articles and case commentaries have been published throughout the EC.
- 8 These articles are listed in the Appendix.
- 9 R Black, "Styles for Averring Jurisdiction under the Civil Jurisdiction and Judgments Act 1982", 1987 SLT (News) 1.
- 10 The case law in which a different approach is taken to certain matters will be considered below.
- 11 The seminars were organised by the University of Edinburgh, the University of Strathclyde and the Law Society of Scotland.
- 12 The amendments were introduced in 1987 and 1988; they will be considered below.
- 13 The two articles are listed in the Appendix.
- 14 Article 1 of the Conventions determines their subject matter scope; reparation actions come within category (i).
- 15 Sections 20 and 21 of the Act determine the subject matter scope of Sched 8; an action concerning the interpretation of a will would come within category (ii).
- 16 Actions of divorce are category (iii) actions.
- 17 As noted in Part I, actions totally internal to the United Kingdom may be outside the scope of the Conventions as a whole.
- 18 Several significant categories of actions are excluded from the subject matter scope of the Conventions.
- 19 This expression is not used in the Conventions themselves or in the Official Reports.
- 20 By SI 1986 No 1946.
- 21 By SI 1988 No 1978.

- 22 (1988) 33 JLSS 362.
- 23 [1978] 1 ALLER 948.
- 24 [1913] AC 107 at p 121.
- 25 At p 955.
- 26 D Maxwell, The Practice of the Court of Session, 1980, pp 47 - 48.
- 27 Preamble to the Act of Sederunt.
- 28 For what little case law there is, see Maxwell, supra.
- 29 1922 SC 497.
- 30 At p 499.
- 31 See, for example, W J Lewis, Sheriff Court Practice, 1939, pp 67 - 68.
- 32 1987 SLT (Sh Ct) 120.
- 33 See p 121.
- 34 R Black, "Pleading Jurisdiction: Negative Averments", 1987 SLT (News) 189.
- 35 Acts of Court of the Sheriffdom of Lothian and Borders.
- 36 St Michael Financial Services v Michie, 1987 SCLR 376.
- 37 I D Macphail, Sheriff Court Practice, 1988, pp 113 - 114.
- 38 (1888) 15 R 359.
- 39 At p 90.
- 40 At p 91.
- 41 1971 Protocol to the Brussels Convention, art 2.
- 42 Article 27(2) is considered in Chapter 12.
- 43 D Series Digest of Cases on the Brussels Convention, published by the European Court.
- 44 Jenard Report, OJ 1979 No C 59/1, p 8.
- 45 In his example the defender contests jurisdiction but does not refer to the Convention.
- 46 It contains no words restricting its scope in this way. The reason for its scope not being restricted is explained below.

- 47 Supra, p 38.
- 48 Supra, p 39.
- 49 Supra, p 39.
- 50 Jenard and Möller Report (on the Lugano Convention), OJ 1990 No C 189/57.
- 51 At para 63.
- 52 OJ 1979 No C 59/71.
- 53 G A L Droz, Compétence judiciaire et effets des jugements dans le Marché commun: Etude de la Convention de Bruxelles du 27 septembre 1968, 1972.
- 54 At para 252.
- 55 There has subsequently been a major revision of the code.
- 56 Para 252.
- 57 Para 253.
- 58 Para 253.
- 59 Para 253.
- 60 P 91.
- 61 Schlosser Report, OJ 1979 No C 59/71, para 22.
- 62 See, for example, Droz, supra, para 244.
- 63 Jenard Report, p 8; Droz, supra, p 46.
- 64 Schlosser Report, para 22.
- 65 Para 22.
- 66 P 91.
- 67 At p 102.
- 68 Schlosser Report, para 22.
- 69 Schlosser Report, para 22.
- 70 Schlosser Report, para 22.
- 71 Para 22.
- 72 Para 22.
- 73 Para 22.

- 74 Para 22.
- 75 P 125.
- 76 In paras one and three.
- 77 This matter is briefly considered in Chapter 11.
- 78 "regard shall be had to any relevant principles....and to any relevant decision".
- 79 1989 GWD 8-347.
- 80 1990 SCLR 140.
- 81 Its scope is limited by ss 16 & 17 of and Sched 5 to the Act.
- 82 See Civil Judicial Statistics for Scotland, published annually by HMSO.
- 83 At pp 90 - 91.
- 84 Section 3 of Title II, containing arts 7 - 12A, is headed "Jurisdiction in matters relating to insurance".
- 85 Section 4 of Title II, containing arts 13 - 15, is headed "Jurisdiction over consumer contracts".
- 86 Anton, supra, p 112.
- 87 These decisions are summarised in the Jenard and Möller Report at pp 101 - 103.
- 88 [1985] ECR 99, [1985] 1 CMLR 806.
- 89 The dicta of Schlosser, Droz and other writers are considered in Part I.
- 90 See British Steel Corporation v Allivane International, 1988 SCLR 562, 1989 SLT (Sh Ct) 57; the SCLR report contains a commentary by the present writer.
- 91 The safe course may very well be to assume that there is not a category of internal actions outside the scope of the Conventions as a whole; see Part I.
- 92 If, in the rule 5(5) context, such an agreement were held to be valid, this would appear to be a decision at variance with Rösler v Rottwinkel. But in the light of the general controversy surrounding the merits of that case, and the fact that rules in Sched 8 need not be interpreted in the same way as their parallel provisions in Title II of the Conventions, such a decision cannot be considered to be out of the question.
- 93 See s 20(1) of the Act.

94 The effect of prorogation agreements in favour of courts of third states is considered in Part I.

95 See s 16(4).

96 Supra, p 105.

97 The decisions are summarised in the Jenard and Möller Report at pp 100 - 101.

98 Supra, pp 107 - 108.

99 Jenard Report, supra, p 38.

100 Droz, supra, para 209.

101 Droz, supra, para 249.

102 Jenard Report, supra, p 37.

103 1987 SCLR 376.

104 P 377.

105 1987 SCLR 745.

106 P 747.

107 At p 92.

108 At seminars on civil jurisdiction organised by the University of Strathclyde.

109 Pace G Duncan and D O Dykes, The Principles of Civil Jurisdiction, 1911, p 262.

110 (1895) 22 R 389.

111 Duncan and Dykes, supra, p 262; neither is Wilkie v Cathcart, (1870) 9 M 168, cited in A E Anton with P R Beaumont, Private International Law, 2 ed, 1990, at p 172, good authority for this proposition.

112 The words from "whether" to "Schedule 8" are inserted primarily so that practitioners do not fail to make the envisaged averment in certain actions, believing that it is not required on account of the internal / domestic nature of the action.

113 In St Michael Financial Services v Michie (supra) and Central Farmers v Watson (supra) the effect of art 21 does appear to have been equated with that of art 17.

114 And of course the actions did not fall within the scope of art 16.

- 115 At p 41.
- 116 At p 41.
- 117 At p 39.
- 118 Droz, supra, Première Partie.
- 119 At para 308.
- 120 Jenard Report, supra, p 41.
- 121 At para 308.
- 122 The subject of identical actions and third states is considered in Part I.
- 123 See Overseas Union Insurance v New Hampshire Insurance, The Times, 27-9-88.
- 124 Sentences in para 308.
- 125 It is clear from its terms that art 21 applies regardless of the ground of jurisdiction of the court seised second.
- 126 See Droz, supra, para 312.
- 127 This point is considered further in Part I.
- 128 See, for example, S O'Malley and A Layton, European Civil Practice, 1989, p 646.
- 129 P Kaye, Civil Jurisdiction and Enforcement of Foreign Judgments, 1987, p 883.
- 130 In contrast to the position under the Conventions, the court exercises a discretion at common law in considering whether, on the basis of forum non conveniens or lis alibi pendens, an action should be dismissed or sisted on account of an identical action elsewhere; see Part I.
- 131 At p 41, in the passage quoted above.
- 132 See Zelger v Salinitri (No 2), [1984] ECR 2397, [1985] 3 CMLR 366.
- 133 1987 SLT (Sh Ct) 120.
- 134 At p 121.
- 135 In Chapter 2.
- 136 [1978] 1 ALLER 948 at p 955.
- 137 This provision will be considered in Chapter 7.

- 138 Rule 8.
- 139 At p 92.
- 140 1987 SLT (Sh Ct) 120 at p 121.
- 141 The Convention came into force there on 1 February 1973.
- 142 They were considered by the present writer at 1987 SLT (News) 181.
- 143 Section 20(5) of the Act.
- 144 If he is domiciled in Dundee, the United Kingdom courts have jurisdiction on account of art 2 of the Conventions. Which particular United Kingdom courts have jurisdiction is, at least as a general rule, a matter for the United Kingdom Parliament and courts alone.
- 145 In addition to the cases in the D Series Digest, there are now the English decisions in Minster Investments v Hyundai Precision and Industry Co, [1988] 2 LLR 621 and Shevill v Presse Alliance, The Times, 13-3-91.
- 146 See, for example, Anton, supra, p 120.
- 147 There is no equivalent of art 20 para two in Sched 8.
- 148 Jenard Report, p 40.
- 149 Droz, supra, para 259.
- 150 Ireland.
- 151 Norway, Sweden and Finland.
- 152 On citation and service see J O A Fraser, "The Writ" in "Procedure: Civil Procedure" in vol 17 of The Laws of Scotland: Stair Memorial Encyclopaedia, 1989 at pp 420 - 426.
- 153 Ordinary Cause Rules, rule 21A.
- 154 Rule of Court 74A; Ordinary Cause Rules, rule 12.
- 155 Ibid.
- 156 Supra, p 90.
- 157 Droz, supra, para 248.
- 158 Just as art 20 of the Conventions is not applicable in the case of a defender domiciled in two contracting states being sued in one of them.
- 159 See the following paragraphs for comments on this draft provision.

160 This draft provision is commented on at the end of this chapter.

161 The need for general averments of jurisdiction is considered in chapter 7.

162 This matter is considered in Part I.

163 Moreover the present writer is preparing a jurisdiction styles book which will be published by W Green in 1992; he hopes that it will be possible in one way or another to update it regularly.

164 Article 5 is designed to enable defenders to be sued in certain courts of states in which they are not domiciled.

165 For on account of art 2 of the Conventions the United Kingdom courts have jurisdiction over him; which particular courts have jurisdiction is purely a matter for the law in the United Kingdom.

166 Rule 2(9) provides that as a general rule a person may be sued "in proceedings which are brought to assert, declare or determine proprietary or possessory rights, or rights of security, in or over moveable property, or to obtain authority to dispose of moveable property, in the courts for the place where the property is situated".

167 He could also, of course, be sued in Inverness sheriff court on account of his domicile in Inverness.

168 The policy of the Conventions to leave matters of internal jurisdiction to the law of the state concerned has already been considered.

169 There does not appear to be any good reason for art 20 of Sched 4 not to be given an interpretation in line with that of art 20 of the Conventions.

170 On account of art 52 para two of the Conventions, the practitioner must, of course, in principle apply the law of each contracting state to determine whether or not a natural person defender is domiciled in the state.

171 Section 41(7) of the Act sets out rules for determining the domiciles of natural persons in non-contracting states. But it would appear only to be of relevance in the context of art 59 - which concerns recognition and enforcement.

172 See, for example, R Black, An Introduction to Written Pleading, 1982, p 12.

173 Apparently Dingwall and Lochmaddy.

174 See Chapter 6.

175 1987 SLT (News) 1.

- 176 SI 1986 No 1946.
- 177 By SI 1988 No 1978.
- 178 There have been numerous amendments; the Parliament House Book contains the amended version of the provision.
- 179 Section 35(1)(c) as amended.
- 180 Rule 23 of the Summary Cause Rules.
- 181 See s 35(2) of the Sheriff Courts (Scotland) Act 1971.
- 182 SI 1988 No 1999.
- 183 Published as SI 1988 No 1976.
- 184 1990 SLT (Sh Ct) 53.
- 185 P 54.
- 186 P 54.
- 187 P 54.
- 188 By SI 1986 No 1941.
- 189 By SI 1987 No 1206.
- 190 On account of SI 1987 No 1206.
- 191 The schemes being found, of course, in Schedules 1, 4 and 8 to the Act.
- 192 The Convention was given the force of law in the United Kingdom by the Child Abduction and Custody Act 1985.
- 193 On the interpretation of the Brussels Convention, see, for example, Anton, supra, Chapter 2.
- 194 The "commercial" exclusion from the scope of the Brussels Convention is covered very briefly in Anton, supra, at pp 42 - 43.
- 195 Supra, p 178.
- 196 See art 18 of the Conventions, interpreted by the European Court in the cases cited at p 103 of the Jenard and Möller Report.
- 197 See Chapter 5.
- 198 In Chapter 5.
- 199 See Chapter 5.
- 200 In Chapter 3.

- 201 At p 92.
- 202 By SI 1986 No 1946.
- 203 By SI 1986 No 1946.
- 204 On account of SI 1986 No 1946.
- 205 By SI 1986 No 1946.
- 206 To be found in SI 1988 No 1976.
- 207 By SI 1986 No 1941.
- 208 By SI 1987 No 1206.
- 209 By SI 1987 No 2160.
- 210 By SI 1987 No 1206.
- 211 By SI 1987 No 2160.
- 212 None of the "commercial" exclusions from the Act are listed.
- 213 See s 2.
- 214 See s 1(2).
- 215 In s 1(2).
- 216 See the passages by Jenard, Schlosser and Droz set out in Chapter 3.
- 217 The Preamble states that the contracting states are "[a]nxious to strengthen in the Community the legal protection of persons therein established".
- 218 The Preamble states that the contracting states wish "to introduce an expeditious procedure for securing the enforcement of judgments".
- 219 At p 123.
- 220 Supra, p 139.
- 221 See the discussion of recognition and enforcement in Part I.
- 222 See, for example, O'Malley and Layton, supra, pp 667 - 668.
- 223 In art 20 para two.
- 224 Article 1 of the 1965 Convention states that the Convention "shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad".

225 Of course on account of the rules of court concerning service, it would appear to be highly unusual for service to take place abroad in the case of a defender domiciled in another United Kingdom law district.

226 And of course art 15 of the Hague Convention should be the subject of a separate provision too, if only because its subject matter scope is different from those of the Brussels and Lugano Conventions and Sched 4.

227 See Chapter 9.

228 But the provision of relevance, art 52(3), is deleted from the Brussels Convention by the 1989 Accession Convention, and it has never appeared in the Lugano Convention.

229 The importance of the date of the bringing of proceedings is trite. It is recognised in the standard averment that the defender is domiciled in the sheriffdom at the date of the raising of the action. A defender clearly cannot be allowed to take jurisdiction away from the court seised by ceasing during the action to be domiciled in its territory.

230 Supra, p 91.

231 [1981] ECR 1593, [1982] 2 CMLR 773.

232 [1982] ECR 2723, [1983] 1 CMLR 665.

233 Maxwell Report, p 94.

APPENDIX: TABLE OF AUTHOR'S PUBLICATIONS ON ASPECTS OF CONVENTIONS
AND ACT

(a) Book

Domicile Flowcharts: A Guide to the Statutory Rules of Domicile and
Seat Applicable in Scotland, T & T Clark, Edinburgh, 1991

(b) Contributions to conference proceedings, articles, book review, case
commentaries, letter

1987

"The Civil Jurisdiction and Judgments Act 1982: Some Questions and
Answers", (1987) 55 SLG 64

"The Civil Jurisdiction and Judgments Act 1982", 1987 SLT (News) 29

"Jurisdiction in Actions Concerning Foreign Land", 1987 SLT (News) 53

"Civil Jurisdiction and Consumer Contracts", 1987 SLT (News) 181

"Domicile: the New Rules", 1987 SLT (News) 321, 329

1988

"Averments about Prorogation Agreements and Identical Actions: The
New Rules", (1988) 33 JLSS 362

commentary on British Steel Corporation v Allivane International,
1988 SCLR 568

"Summary of European Court Practice", (1988) 56 SLG 11

"Jurisdiction in Reparation Actions", (1988) 56 SLG 64

"Jurisdiction in Contract Actions", (1988) 56 SLG 97

1989

"Civil Jurisdiction and Judgments Act 1982: The Importance of the
Defender's Domicile", (1989) 34 JLSS 180

"The Brussels Convention and the Scottish Courts' Discretion to
Decline Jurisdiction", 1989 JR 150

"Interpretation of Civil Jurisdiction and Judgments Act 1982, Section 41 ("Domicile of Individuals")", (1989) 57 SLG 104

letter concerning article on prorogation agreements and the Act, 1989 SLT (News) 391

1990

"Jurisdiction and Competency in Proceedings for Judicial Review", 1990 SLT (News) 1

1991

"Civil Jurisdiction and Judgments Act 1982: Check List of Scottish Decisions on the Act and the Related Rules of Court, 1987-90", (1991) 36 JLSS 67

"Civil Jurisdiction and Judgments Act 1982: Check List of Non-Scottish Decisions on the Act, 1982-90", (1991) 36 JLSS 272

review of S O'Malley and A Layton, European Civil Practice, (1991) 38 NILR 82

commentary on Davenport v Corinthian Motor Policies at Lloyds, 1991 SCLR forthcoming

commentary on Jenic Properties v Andrew Thornton Architectural Antiques, 1991 SCLR forthcoming

1992

"The Brussels and Lugano Conventions and the United Kingdom", in proceedings of 1991 conference in University of Heidelberg on the Conventions and the developments in Eastern Europe, C F Müller, Heidelberg, forthcoming

"The Brussels Convention and Third States", in proceedings of 1991 conference in University of Heidelberg on the Conventions and the developments in Eastern Europe, C F Müller, Heidelberg, forthcoming

(c) Flowcharts

Civil Jurisdiction Flowchart, Law Society of Scotland, Edinburgh, 1985, reprinted 1986

"Civil Jurisdiction Flowchart", supplement to NLJ, 25-3-88

"Enforcement of Judgments Flowchart", 1988 NLJ The Practitioner 254

"Cuadro sinóptico de la competencia judicial en la CEE y en los países de la EFTA", forthcoming

"Cuadro sinóptico de la ejecución de resoluciones judiciales en la CEE y en los países de la EFTA", forthcoming